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15235

(18,745.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 165.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, PETITIONER,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. JONES, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 13, 1903.

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1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } ss:

At a stated term of the circuit court of the United States of America, within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court rooms at the city of Columbus, Ohio, in said district, on the first Tuesday in June, being also the fourth day of the month, in the year of our Lord one thousand nine hundred and one, and of the American Independence the one hundred and twenty-fifth.

Present: The Honorable Albert C. Thompson, district judge.

Among the proceedings had were the following, to-wit:

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY ET AL., Defendants.

Be it remembered, that heretofore, to-wit, on the 21st day of June, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures following, to-wit:

Entry Journal D, page 336.

Entry.

This day, on application of complainants, leave is given complainants to file herein an amended bill of complaint in accordance with the decision of the supreme court hereinbefore rendered herein.

And at the same time, on application of defendants, Sosman & Landis, leave is hereby given said defendants to file herein an amended answer and cross-bill to the amended bill of complainants.

2 And afterwards, to-wit, on the 21st day of June, in the year of our Lord one thousand nine hundred, came the complainant herein, by its solicitors, and filed in the clerk's office of the court aforesaid its certain bill of complaint against the defendants herein, which said bill of complaint is clothed in the words and figures following, to-wit:

Amended Bill of Complaint.

To the honorable judges of the circuit court of the United States for the southern district of Ohio, eastern division, sitting in equity:

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. JONES, Jr., Mary F. Laughlin, Mary McM. Laughlin, Magdalaine F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, Trustees under the Last Will and Testament of Thomas M. Jones, Jr., Deceased, for William L. Jones, Mary J. Hillard, and Thomas M. Jones, Jr., Partners Doing Business under the Firm Name and Style of Jones & Laughlins, Limited, Brings This Their Amended Bill of Complaint, Complainants,

vs.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation; The Akron Hydraulic Press Brick Company, a Corporation; Joseph Sosman and Jerry Landis, Partners Doing Business under the Firm Name and Style of Sosman & Landis; The American Blower Company, a Corporation; The United States Mortgage & Trust Company, a Corporation, and The Grand Rapids School Furniture Company, a Corporation, Defendants.

3 Your orators brings this their amended bill of complaint and say:

1st. Your orators, Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madeline F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and each of them are members of and shareholders in the limited partnership association, or joint stock company doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association organized under an act of the General Assembly of Pennsylvania, approved June 2d, 1874, entitled "An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances." The principal office and place of business of said association is in the city of Pittsburg, in the State of Pennsylvania.

On the — day of April, 1899, Thomas M. Jones, then and at all times hereinafter mentioned having been a citizen of the State of Pennsylvania, died a member of and owner of certain shares in said limited partnership association, and leaving a last will and testament by which he devised and bequeathed to your orators, Benjamin F. Jones and William L. Jones, and to Annie E. Jones, all of his stock and interest in said limited partnership association, to be held

in trust for William L. Jones, Mary J. Hillard and Thomas M. Jones, Jr., until the 3d day of August, 1903. Said Annie E. Jones has since deceased, and your orators, Benjamin F. Jones and William E. Jones, are the sole surviving trustees under said will, and are now duly qualified and acting as such, and as such trustees hold the interest of said Thomas M. Jones in said firm in trust for said persons, and as such trustees are members of and shareholders in said limited partnership association of Jones & Laughlins, Limited, and are and at all times hereinafter mentioned have been citizens of the State of Pennsylvania, and their *cestuis qui trustant* William L. Jones, Mary J. Hillard and Thomas M. Jones, Jr., are also, and at all times hereinafter mentioned have been citizens of the State of Pennsylvania.

Your orators, Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madelaine F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza Phillips, and Ben-
4 jamin F. Jones, and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hillard and Thomas M. Jones, Jr., are all of the members and shareholders of said limited partnership association, and your said orators and each of them are now, and at all times hereinafter set out, have been citizens of the State of Pennsylvania.

The defendant, The Great Southern Fire Proof Hotel Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and has its principal office of business in the city of Columbus, and county of Franklin in the said State, and in the eastern division of the southern district of the United States court of Ohio, and is a citizen of the said city of Columbus, and State of Ohio, and in the eastern division of the southern district of said court.

The defendant, The Akron Hydraulic Press Brick Company is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and is a citizen thereof.

The defendants, Joseph Sosman and Perry Landis, are partners doing business under the firm name and style of Sosman & Landis, and are each residents of the city of Chicago, in the State of Illinois, and are, and have been, at all times hereinafter mentioned, citizens of said State of Illinois.

The defendant, The American Blower Company, is a corporation organized and existing under the laws of the State of Michigan, and is a citizen of the State of Michigan.

The defendant, The United States Mortgage & Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen of the said State.

The defendant, The Grand Rapids School Furniture Company, is a corporation organized under the laws of the State of Michigan, and is a citizen of the said State of Michigan.

2d. Your orators further say that the amount in controversy in

this case is more than two thousand dollars, exclusive of costs and interest.

3d. Your orators further say that on the 13th day of December, 1894, they made and entered into a certain written contract with one William J. McClain, a copy of which contract is hereto*fore* attached and marked Exhibit "A;" that said William J. McClain for some time prior to and at said time was engaged as principal con-
5 tractor for the defendant, The Great Southern Fire Proof Company, in erecting and constructing for the said The Great Southern Fire Proof Hotel Company a six-story fire-proof hotel and opera-house or theatre on the premises hereinafter described, under and by virtue of the certain written contract with said The Great Southern Fire Proof Hotel Company, in which said contract the said McClain agreed and *constructed* as such principal contractor to construct and complete said fire-proof hotel and opera-house for said company, for the sum of $345,000. That by the terms of the said written contract made and entered into by your orators and the said William J. McClain the terms of which contract are herein set out in Exhibit "A," it was provided that your said orators should furnish the said William J. McClain with nine hundred tons of structural steel for the Great Southern Fire Proof Hotel Company, for the said hotel in the city of Columbus, and State of Ohio, said structural steel to be fitted and ready for erection; said structural steel to be so furnished for the sum of $32,500, delivered f. o. b. cars, Columbus.

Your orators further say that it was further provided in said contract if an additional quantity of structural steel should be required by the said William J. McClain, more than the nine hundred tons provided for in said written contract, your orators were to furnish the said William J. McClain with the said additional structural steel at the rate of $1.81 per one hundred pounds; that if an amount of structural steel less than the said nine hundred tons should be required by the said William J. McClain for the purpose stated in said written contract, then your said orators were to allow the said William J. McClain a reduction from the said contract price for said structural steel at the rate of $1.81 per one hundred pounds, for the difference between the structural steel actually shipped and the said nine hundred pounds provided for in said contract.

Your orators further say that it was still further provided in said contract that your said orators were to commence the shipping of said structural steel at once, and that the order for the same should be completed by your orators before the first day of August, 1895.

Your orators still further say that it was still further provided for in said written contract that the payments to your said orators by the said William J. McClain for the structural steel provided for in said written contract were to be cash payments, the same to be made on the fifth day of the month following the shipment of said steel.

6 4th. Your orators further say that in pursuance of the terms and conditions of said written contract and in strict compliance therewith, your orators between the 16th day of April,

1895, and the 29th day of January, 1896, shipped to and furnished the said William J. McClain with structural steel to the value of $43,296.74, as per an itemized account hereto attached and marked Exhibit "B," which said structural steel so furnished was all used in and about the construction of said The Great Southern fire proof hotel and opera-house in the city of Columbus, and State of Ohio. And your orators say that they have fully kept and performed all the terms and conditions of said written contract on their part to be kept and performed.

5th. Your orators further say that they have received from the said William J. McClain on said written contract the sum of $31,886.72, leaving a balance still due your orators from said William J. McClain for materials furnished him, and labor performed for him under and according to the terms of said written contract the sum of $11,410.02, with interest thereon from the 28th day of January, 1896.

6th. Your orators further say that on the 11st day of August, 1896, the said William J. McClain made and filed in the probate court of Franklin county, Ohio, a deed of assignment for the benefit of his creditors to F. Bert Milligan, assignee; that said Wm. J. McClain is wholly insolvent and unable to pay the claims of said creditors, including the said claims of your said orators.

7th. That on the 21st day of April, 1896, at 4.50 o'clock p. m., within four months after having furnished said material and having performed said labor under and according to the terms of said written contract, your orators duly filed with the recorder of Franklin county, Ohio, an affidavit, containing an itemized statement of the amount and value of said materials furnished and labor performed according to the terms of said written contract between your orators and the said William J. McClain, with all credits thereon, together with a copy of said written contract with the said William J. McClain under which written contract the said material was so furnished and the said labor was so performed; and also, a description of the premises upon which the said The Great Southern fire proof hotel and opera-house was situate, which said affidavit was thereafter recorded in Book No. 9, pages 99, 100, 101, of the records of liens of said Franklin county, Ohio, and that upon said 2d
7 day of April, 1896, there was due your said orators upon said account from the said William J. McClain the sum of $11,140.02, with interest thereon from the 28th day of January, 1896.

8th. Your orators further say that the said affidavit was so filed with the said recorder of Franklin county, Ohio, in compliance with the terms and provisions of section 3184 as amended April 13th, 1894, and 3185 of the Revised Statutes of the State of Ohio.

9th. Your orators further say that the premises upon which said fire-proof hotel and opera-house building is located are in the county of Franklin, State of Ohio, and in the city of Columbus, and bounded and described as follows:

In lots Nos. 352, 353, 354, said premises being 187½ feet square,

bounded on the north by Main street, on the east by Pearl street, on the south by Noble street, and on the west by High street, in the city of Columbus, and State of Ohio.

10th. Your orators further say that the material so furnished and the labor so performed in accordance with the terms and conditions of said written contract between your orators and the said William J. McClain constitute a part of the improvement provided for in the contract between the said William J. McClain, the principal contractor, and the said defendant, The Great Southern Fire Proof Hotel Company, for the erection of said building, and that the same was and is a part of said building.

11th. Your orators further allege that by reason of the premises their said claim became a valid and subsisting lien on the said The Great Southern fire proof hotel and opera-house, and the tract of land on which the said — is situated and heretofore described, from the 17th day of April, 1895, the date when said labor was commenced, and said material furnished, for the sum of $11,140.02, with interest thereon from the 28th day of January, 1896, the amount now remaining due and unpaid upon your orator's said claim from the said William J. McClain.

12th. Your orators further say that the said opera-house or theatre in said building was completed on or about the 15th day of September, 1896, since which time the defendant, The Great Southern Fire Proof Hotel Company has been and is now receiving as annual rental therefor the sum of $6,500, payable in monthly installments of $541.66⅔ each; that all of the store rooms in said building are now completed and all have been leased to various parties
8 and are now occupied by the said parties at annual rentals, the amount of which is unknown to your orators; that said hotel building is now completed, and that the said defendant, The Great Southern Fire Proof Hotel Company, is negotiating with and about to lease the same to parties, the names of which are unknown to your orators, and the annual rent to be paid for the same by said parties is also unknown to your orators.

13th. Your orators further say that the property heretofore described is probably insufficient to pay the encumbrances thereon, and the appointment of a receiver for the collection of all the rents therefrom is necessary for the protection and preservation of the rights of your orators herein and all other lienholders thereof.

14th. Your orators further say that the defendants, The Akron Hydraulic Press Brick Company, Sosman & Landis, The United States Mortgage & Trust Company, The American Blower Company and The Grand Rapids School Furniture Company, and each claim to have some interest in the said property of the defendant, The Great Southern Fire Proof Hotel Company, as lienholders or otherwise, — the exact nature and extent of which interest your orators are now advised, and cannot, therefore, more definitely state.

And thereupon your orators pray that the said defendants may — require- to answer herein and to fully set forth their respective claims in the premises and in any default thereof they may be forever

barred from asserting any claim whatsoever against said property or any part thereof.

Wherefore your orators respectively pray that a receiver may be appointed herein by your honors to collect all of said rents from the completed portions of said building, so rented as aforesaid, and also all rents which may hereafter accrue by reason of any new leases granted by the said hotel company, and that said receiver be ordered to hold said moneys so collected, subject to the order of your honors herein; that the said claim of your orators against the said William J. McClain be declared by your honors to be a valid and subsisting lien on the premises of the said defendant, The Great Southern Fire Proof Hotel Company, by virtue of said proceedings; that all of the liens on said property be marshaled, and that said premises be sold that your orators' claim may be satisfied from the proceeds of said sale, and that your orators may have such other and further relief as the nature of the case may require and to your honors seem meet.

9 May it please your honors to grant your orators a writ of subpœna, directed to the said defendants, commanding each of them at a certain time, under a certain penalty therein to be named, to be and appear before your honors in this honorable court, and then and there to answer all and singular the matters aforesaid, but not under oath, their answer under oath being waived, and to stand, abide by and perform all such other and further orders and decrees herein as to your honors shall seem meet, and your orators will ever pray, etc.

BENJAMIN F. JONES,
GEORGE M. LAUGHLIN,
BENJAMIN F. JONES, JR.,
MARY F. LAUGHLIN,
MARY McM. LAUGHLIN,
MADELINE F. LAUGHLIN,
WILLIS L. KING,
HENRY A. LAUGHLIN,
JAMES LAUGHLIN, JR.,
JAMES B. LAUGHLIN,
CHARLES C. BRIGGS,
ELIZA L. PHILLIPS, AND
BENJAMIN F. JONES AND
WILLIAM L. JONES,

Trustee under the Last Will and Testament of Thomas M. Jones, Deceased, for William L. Jones, Mary J. Hillard, and Thomas M. Jones, Jr.,

By OUTHWAITE, LINN & THURMAN,
Their Solicitors.

EXHIBIT "A."

"COLUMBUS, O., *Dec.* 13, 1894.

W. J. McClain, Columbus, Ohio.

DEAR SIR: We agree to furnish you with nine hundred (900) tons structural steel for the Great Southern hotel, Columbus, O., fitted ready for erection, in accordance with the revised plans and specifications, for the sum of thirty-two thousand five hundred and eighty ($32,580.00) dollars, delivered f. o. b. cars, Columbus.

We also further agree that if an additional quantity of steel is required more than nine hundred tons above specified, that he will furnish the same at the rate of $1.81 per hundred pounds, delivered at Columbus, or, if a less amount is required than the 900 tons, then we will allow a reduction from the contract prices at the rate of $1.81 per hundred pounds for the difference between the amount shipped and the 900 tons above specified.

It is understood that we can commence shipment at once and that all of the order will be completed before August 1st, 1895.

Terms of payment are cash, to be paid on the fifth of month following shipment.

Yours truly,

(Signed) JONES & LAUGHLINS, LIMITED.
R. GERRY.

The above proposition is this day accepted.

(Signed) W. J. McCLAIN."

EXHIBIT "B."

PITTSBURG, PA., *Mar.* 21, 1896.

Mr. W. J. McClain, Columbus, Ohio, bought of Jones & Laughlins, Limited.

1895.			
April 17th,	mdse		545 10
April 22nd,	"		501 21
May 1st,	"		882 55
May 4th,	"		432 12
May 11th,	"		606 30
May 20th,	"		737 82
May 25th,	"		670 46
May 29th,	"		546 71
June 1st,	"		621 00
June 5th,	"		418 98
June 11th,	"		411 91
June 17th,	"		629 61
June 18th,	"		681 66
June 20th,	"		11 37

June 21st,	mdse	497 49
July 3rd,	"	766 83
July 13th,	"	513 25
July 17th,	"	618 24
July 20th,	"	632 12
July 29th,	"	520 59
August 2nd,	"	664 85
August 5th,	"	719 60
August 8th,	"	566 58
11		
August 12th,	"	453 04
August 16th,	"	507 19
August 20th,	"	830 85
August 26th,	"	823 71
August 28th,	"	1270 48
August 31st,	"	581 92
September 9th,	"	2368 40
September 10th,	"	681 08
September 14th,	"	934 66
September 20th,	"	461 75
September 26th,	"	606 56
September 28th,	"	636 72
October 1st,	"	15 42
October 3rd,	"	992 14
October 7th,	"	1616 69
October 9th,	"	1142 99
October 12th,	"	932 39
October 15th,	"	1126 28
October 16th,	"	489 14
October 17th,	"	694 92
October 19th,	"	922 39
October 23rd,	"	753 21
October 23rd,	"	1060 18
October 24th,	"	698 12
October 24th,	"	1 60
October 25th	"	701 66
October 28th,	"	892 92
October 29th,	"	612 70
October 31st,	"	759 76
November 4th,	"	650 05
November 6th,	"	847 17
November 7th,	"	584 07
November 11th,	"	519 72
November 21st,	"	668 81
November 25th,	"	790 36
November 26th,	"	495 29
December 3rd,	"	575 72
December 11th,	"	16 56
December 31st,	"	1054 31

1896.		
January 10th,	mdse.....	350 07
January 28th,	"	42
		43296 74

CREDITS.

1895.		
May 9th,	by cash.....	1046 31
June 10th,	" "	3875 96
12		
July 26th,	" "	3351 00
August 29th,	" "	3051 00
October 5th,	" "	10000 00
October 31st,	by mdse.....	24 50
November 21st,	" "	84
November 27th,	" "	1 17
November 27th,	" "	8 76
December 23rd,	by cash.....	10000 00
1896.		
March 20th,	by mdse. allowance.....	527 18
		31866 72
	Balance.....	$11410 02

And afterwards, to-wit, on the 17th day of July, A. D. 1900, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Demurrer.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL.
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation, *et al.* } No. 796.

Demurrer of the defendant The Great Southern Fire Proof Hotel Company to the amended bill of complaint of the complainants.

This defendant, The Great Southern Fire Proof Hotel Company, by protestation, not confessing or acknowledging all or any of the matter and things in the said complainants' amended bill to be true and in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainants have not in and by said amended bill

made or stated such a cause as doth or ought to entitle them or any of them to any such recovery or relief as is therein sought and prayed for from or against this defendant.

Wherefore, and for divers other good causes of demurrer appearing on the said amended bill, this defendant demurs thereto
13 and prays the judgment of this honorable court whether it shall be compelled to make any answer to the said amended bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf expended.

J. E. SATER AND
D. F. PUGH,
Solicitors for the Def't The Great Southern Fire Proof Hotel Company.

STATE OF OHIO, }
Franklin County, } ss:

Nicholas Schlee makes solemn oath and says that he is the president of the above named defendant corporation, The Great Southern Hotel Company, and that the foregoing demurrer is not interposed for delay.

NICHOLAS SCHLEE.

Sworn to before me and subscribed in my presence this 14th day of July, 1900.

[SEAL.] E. L. PEASE,
Notary Public in and for Franklin County, Ohio.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. E. SATER,
Of Counsel for the Defendant The Great Southern Fire Proof Hotel Company.

And afterwards, to-wit on the 5th day of December, A. D. 1900, the following entry was made on the journal of said court, clothed in the words and figures following, to-wit:

Entry Journal E, page 7.

BENJAMIN F. JONES ET AL., Complainant-,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY ET AL., Defendant-.

Entry.

This day this cause comes on to be heard upon the demurrer of the defendant, The Great Southern Fire Proof Hotel Com-
14 pany, to the amended bill of the complainants herein, and the said defendant's several demurrers to the answers and cross-

bills to the said amended bill, filed herein by the defendants, Joseph S. Sosman and Perry Landis, doing business under the firm name and style of Sosman & Landis, The Grand Rapids School Furniture Company and The Akron Hydraulic Press Brick Company, and the court, after hearing the agument of respective counsel, and being sufficiently advised in the premises, overrules said several demurrers; to which overruling of the court the defendant excepts, and the exception is allowed.

And defendant, The Great Southern Fire Proof Hotel Company is given to the 5th day of December, 1900, rule day, in which to plead.

And afterwards, to-wit, on the 5th day of December, A. D. 1900, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL Company *et al.*, Defendants. } No. 796. In Equity.

Answer of The Great Southern Fire Proof Hotel Company against the amended bill of complaint filed in this court — complainants.

To the honorable the judges of the circuit court of the United States of the southern district of Ohio, eastern division:

Respondent, The Great Southern Fire Proof Hotel Company, for answer to so much of said amended bill of complaint as it is advised it is necessary for it to answer, says that it is true that the complainants filed with the recorder of Franklin county, Ohio, on the 21st day of April, 1896, what purports to be an affidavit; and it is claimed by said complainants that it was filed under and pursuant to section 3185 of the Revised Statutes of Ohio; but it is not true
15 as alleged in said amended bill, that said affidavit contained an itemized statement of the amount and value of materials furnished and labor performed, under their alleged contract with William J. McClain; on the contrary, said affidavit contains no itemized statement of the amount and value of said materials and labor, and what purports to be an itemized statement, and is made part of said affidavit, only states that on certain days therein mentioned W. J. McClain bought of the complainants merchandise, with the value set opposite to each item; but it nowhere, and in no manner states or attempts to state, what was the character, kind or amount of the merchandise so bought; and said itemized statement does not

state, or attempt to state, the amount and value of any labor performed by said complainants for said W. J. McClain, under said contract; all of which will fully appear by reference to the copy of the said so-called itemized statement, which is attached as Exhibit "B" to said amended bill, and also by reference to a like copy thereof, which is herewith filed marked "Exhibit A" and made part of this answer.

Respondent, therefore, avers and insists that said complainants did not, on the 21st day of April, 1896, or at any other time, acquire and they did not have at any time since then, and they have not now, under the mechanics' statute of Ohio, a subsisting mechanics' lien upon the real estate of respondent, which is described in said amended bill, for the value of said materials furnished and labor performed by said complainants to and for the said W. J. McClain, under their said contract.

Respondent further says that the said affidavit, mentioned in said amended bill, was filed by complainants in said recorder's office, and complainants sought to acquire their alleged mechanics' lien, upon which they rely, on the respondent's said real estate pursuant to, and under the right which was conferred by the act of the General Assembly, passed April 13, 1895, (91 Ohio L., page 135).

But respondent says that said statute is, so far as it attempts to give a lien for materials or labor obtained by the contractor from the sub-contractor, material man or laborer, unconstitutional and void, in this, that it violates the inalienable right of enjoying liberty and acquiring property, granted by section one of the bill of rights of the constitution of the State of Ohio.

Respondent further says that on December 8, 1896, the supreme court of the State of Ohio, being the highest court of the State,
16 determined and adjudged that said statute, so far as it gave a lien on the property of the owner to sub-contractors, laborers and those who furnish machinery, material or tile to the contractor, was unconstitutional and void; because it contravened and violated the provisions of said first section of the said bill of rights of the constitution of Ohio—all of which will fully appear by reference to the decision and the opinion of the said court in the cases of Palmer and Crawford *vs.* Tingle, and Young *vs.* Lion Hardware Company, reported in 55 Ohio State Reports, 423.

Respondent is advised, and therefore shows, that said decision was rendered in cases which involved alleged rights under a State statute, and that it determined the validity of a State statute, under the constitution of the State of Ohio; wherefore, the United States courts should follow the said decision of the supreme court of Ohio.

Respondent, for these reasons, represents and submits that the complainants did not, on the 21st day of April, 1895, or at any other time, acquire; that they did not, at the commencement of this suit have, and that they have not now, a subsisting mechanics' lien on the said real estate belonging to this respondent, for the value of materials furnished and labor performed by them, under their said contract with the said William J. McClain, contractor.

Respondent further says that by this answer it seeks relief against the attempt on the part of the complainants to enforce against this respondent the said statute of Ohio, because the operation of said statute, if permitted, would take from this respondent its property without due process of law, and deny to it the equal protection of the law, in contravention and violation of the provisions of the Constitution of the United States, and especially contrary to, and in violation of, section 1 of article 14 of the amendments to the Constitution of the United States.

Respondent, having fully answered said amended bill, prays that the court may decree that the said act of the General Assembly of Ohio, passed April 13, 1895 (91 Ohio L., page 135), is unconstitutional and void; that this respondent be dismissed from this suit; that the complainant's amended bill and this suit may be dismissed, at their costs; that the respondent may recover its costs in its behalf in this suit expended, and that it may have such other and further relief as the nature of the case may require, and as to equity may appertain.

J. E. SATER AND
PUGH & PUGH,
Attorneys for Respondent.

17 STATE OF OHIO, } *ss:*
Franklin County, }

Frank E. Lauterbach, being duly sworn, says that he is the secretary of the Great Southern Fire Proof Hotel Company, duly authorized to make this affidavit; that he makes this affidavit as such officer on behalf of said company; that he has read the said answer, and knows the contents thereof; that the same is true to his own knowledge, except as to matters of opinion, and as to those matters he believes them to be true.

FRANK E. LAUTERBACH.

Sworn to before me by the said Frank E. Lauterbach, and by him subscribed in my presence, this 4th day of December, A. D. 1900.

[SEAL.] G. L. STOUGHTON,
Notary Public.

Tax 40c.

EXHIBIT "A."

PITTSBURGH, PA., *March* 21, 1896.

Mr. W. J. McClain, Columbus, Ohio, bought of Jones & Laughlin, Limited.

1895.		
April 17th,	mdse.....	$545 10
April 22,	"	501 21
May 1st,	"	882 55
May 4th,	"	432 12
May 11th,	"	606 30

May 20th,	mdse	737	82
May 25,	"	670	46
May 29,	"	546	71
June 1st,	"	621	00
June 5th,	"	418	98
June 11th,	"	491	91
June 17th,	"	629	61
June 18th,	"	681	66
June 20th,	"	11	37
June 21st,	"	498	49
July 3rd,	"	766	83
July 13th,	"	513	23
July 17th,	"	618	24
July 20th,	"	632	12
July 29th,	"	520	59
August 2nd,	"	664	85
August 5th,	"	719	60
August 8th,	"	566	58

18

August 12th,	"	453	04
August 16th,	"	507	19
August 20th,	"	830	85
August 26th,	"	823	71
August 28th,	"	1270	48
August 31,	"	581	92
September 9th,	"	2368	40
September 10th,	"	681	08
September 14th,	"	934	66
September 20th,	"	461	75
September 26th,	"	606	56
September 28th,	"	636	72
October 1st,	"	15	42
October 3rd,	"	892	14
October 7th,	"	1616	69
October 9th,	"	1142	99
October 12th,	"	932	39
October 15th,	"	1126	28
October 16th,	"	489	14
October 17th,	"	984	92
October 19th,	"	922	39
October 23rd,	"	753	21
October 23rd,	"	1060	18
October 24th,	"	698	12
October 24th,	"	1	61
October 25th,	"	701	66
October 28th,	"	892	92
October 29th,	"	612	70
October 31st,	"	759	76
November 4th,	"	650	05

November 6th,	mdse	847	17	
November 7th,	"	584	07	
November 11th,	"	519	72	
November 21st,	"	668	81	
November 25th,	"	790	36	
November 26th,	"	495	29	
December 3rd,	"	575	72	
December 11th,	"	16	56	
December 31st,	"	1054	31	
1896.				
January 10th,	"	350	07	43,296 74
January 28th,		42		

CREDITS.

1895.				
May 9th,	by cash	1046	31	
June 10th,	"	3875	96	
19				
July 26th,	"	3351	02	
August 29th,	"	3051	00	
October 5th,	mdse	10000	00	
October 31st,	"	24	50	
November 21st,	"	24	50	
November 27th,	"		84	
November 27th,	"	1	17	
December 23rd,	cash	8	76	
		10000	00	
1896.				
March 20th,	mdse. allowance	527	16	
				31,866 72

Balance $11,410 02

And afterwards, to wit, on the 31st day of December, A. D. 1901, the following replication was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Replication.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madelaine F. Laughlin, William L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, Trustees under the Last Will and Testament of Thomas M. Jones, Deceased, for William L. Jones, Mary J. Hilliards and Thomas M. Jones, Jr., Partners Doing Business under the Firm Name and Style of Jones & Laughlin, Limited, Complainants,

vs.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation; The Akron Hydraulic Press Brick Company, a Corporation; Joseph Sosman and Perry Landis, Partners Doing Business under the Firm Name and Style of Sosman & Landis; The Grand Rapids School Furniture Company, a Corporation; The American Blower Company, a Corporation, and The United States Mortgage & Trust Company, a Corporation, Defendants.

No. 796.

Replication of complainants in the above entitled cause to answer of The Great Southern Fire Proof Hotel Company, defendant.

20 These replicants, saving and reserving the advantages of exception to the manifold insufficiencies of said answer, for replication thereto say, that they will aver and prove their said bill to be true and sufficient, and that the said answer is untrue and insufficient; wherefore, they pray relief as in said bill set forth.

OUTHWAITE, LINN & THURMAN,
Solicitors for Replicants.

And afterwards, to wit, on the 12th day of April, A. D. 1901, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

JONES & LAUGHLIN, LIMITED, Complainant,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY ET AL., Respondents.

Motion.

Now comes the defendant, The Great Southern Fire Proof Hotel Company, and shows to the court:

(1.) That the plaintiff lately filed his bill in this case against the defendant, who appeared thereto, and upon the 5th and 11th day of December, 1900, it filed its answers to the said bill and the cross-bills of the American Blower Company, the Akron Hydraulic Press Brick Company, and Sosman & Landis.

(2.) This defendant has since discovered some additional facts, which it could not have acquired knowledge of before by reasonable diligence, and it desires to amend its respective answers to the said cross-bill.

And, therefore, moves the court for leave to amend its answer by consent.

THE GREAT SOUTHERN FIRE PROOF HOTEL CO.,
By J. E. SATER &
PUGH & PUGH, *Its Attorneys.*

And afterwards, to wit, on the 15th day of April, A. D. 1901, the following entry was made on the journal of said court, clothed in the words and figures following, to wit:

21–34 Journal E, page 127.

BENJAMIN F. JONES ET AL.
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY *et al.* No. 796.

Leave to file amended answer in these cases is refused. The amendments are not material and come too late.

A. C. T.

35 And afterwards, to-wit, on the 27th day of June, A. D. 1901, the following opinion was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

BENJAMIN F. JONES ET AL., Complainant-,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, Defendant.
No. 796.

Cross-Bills Setting up Mechanics' Liens Submitted on Agreed Statements of Facts.

First. Jones and Laughlin.

A person who performs labor or furnishes material for the erection of a building shall save a lien, to secure payment therefor upon the building and upon the land upon which it stands. O. R. S., sec. 3184. The laws of Ohio prescribing the steps necessary
36 to be taken to obtain the lien have been greatly changed during the last fifty years, and now differ materially from the laws of many of the States, whose decisions in mechanics' lien cases have been cited by counsel.

In order to obtain a lien the person who performs the labor or furnishes material must, within four months of the time of performing such labor or furnishing such material, file with the county recorder an affidavit containing:

1. An itemized statement of the amount and value of such material or labor.
2. A description of any promissory note or notes given for such labor or material, with all credits and offsets thereon.
3. A copy of the contract, if it is in writing, a statement of the amount and times of payments to be made thereunder.
4. A description of the land.
5. And, by implication, the dates of the first and last items of labor performed, or material furnished.

And the affidavit, when recorded, shall operate as a lien, from the date of the first item of the labor performed or material furnished, on the building and land, for six years, from and after the date of the filing of such attested statement.

The statute requires that the "itemized statement" shall show the amount and value of the labor or material. It appears from the affidavit that material was furnished for the construction of the building, and that it was furnished in pursuance of the contract, a copy of which is embodied in the affidavit, and it appears from the contract that the material so furnished was structural steel. The itemized statement shows the date of the delivery of the steel, the value of each delivery, and, although the amount of each delivery is not expressly stated, yet it can be ascertained from the terms of the contract, having the value of each delivery and the contract price per one hundred pounds, the amount of each delivery is easily ascertained. The amount, therefore, is stated with sufficient certainty for *id certum est quod reddi potest.*

Second. Sosman and Landis.

The copy of the contract embodied in the affidavit shows that

Sosman and Landis agreed to supply certain scenery, stage work, fixtures and properties as set forth in detail in a certain specification marked Exhibit "A," attached to and made a part of the con-
37 tract, but the specification is not given. It is not attached to the copy embodied in the affidavit, and therefore neither the files nor the record of the recorder of Franklin county will show this specification, and without — those interested are unadvised whether this material was furnished for or entered into the construction of the building. The specification is a part of the contract and a copy of the contract, within the meaning of the statute, necessarily includes a copy of the specification, and by its omission the claimants failed to comply with a material requirement of the statute. The lien claimed cannot be sustained.

Third. The American Blower Company.

This was an entire job for an entire price, and a detailed statement of labor and material was not required. 60 S. 473. The Missouri case cited (6 Mo. App. 54; 14 Mo. 270) are not applicable, because the Missouri statute does not require a copy of the contract to be filed. The first date of the itemized statement is the date of the execution of the contract, as will be seen by reference to the contract; namely, September 19, 1895. The date of the next item is November 4, 1895, which is the date of the commencement of actual work. There has been a substantial compliance with the statute, and the lien will be sustained.

Fourth. The Grand Rapids School Furniture Company.

The only objection made to this claim is that the affidavit was not made by an officer of the corporation, but by a mere agent. The objection is not well taken, and the lien will be sustained.

Fifth. The Akron Hydraulic Press Brick Company.

The affidavit shows that there was a contract to furnish brick and that they were furnished, as shown by the itemized statement, which gives dates, amounts and value. The entries in this account are such as will be understood by those in the trade. The lien will be sustained.

Sixth. C. B. Wood.

Here there was an entire job for an entire price, the price being $8164, subject to certain possible deductions, but the work was not completed and the claim is for a partial performance, full performance being prevented by the general contractor. The affidavit, therefore, should contain an itemized statement, showing the
38 amount and value of the labor performed and the material furnished, but the affidavit does not show the amount of either nor are there any facts stated in the affidavit from which the same can be ascertained. The affidavit is insufficient and the lien claimed cannot be sustained.

Replications should be filed to the answers to each of these cross-bills. There will be findings and a decree in accordance with this opinion.

And afterwards, to-wit, on the 20th day of August, A. D. 1901, an entry was made upon the journal of said court, clothed in the words and figures following, to-wit:

Journal E, page 186.

This day this cause came on to be heard upon the bill of complainants filed herein, the answer of the defendant, The Great Southern Fire Proof Hotel Company, and the replication of complainants thereto and the evidence and proofs in the case, and was argued by counsel.

Whereupon the court finds upon consideration of the said bill the answer thereto of the defendant, The Great Southern Fire Proof Hotel Company, the replication of complainants and the said evidence and proofs, in favor of complainants, and that the said complainants, Benjamin F. Jones, *et al.*, duly filed in the recorder's office of Franklin county, Ohio, on the 21st day of April, 1896, at 4:50 p. m., a certain affidavit for a mechanic's lien upon the premises then owned by the defendant, The Great Southern Fire Proof Hotel Company, and bounded and described as follows:

In lots Nos. 352, 353, 354, said premises being 187½ feet square, bounded on the north by Main street, on the east by Pearl street, on the *north* by Noble street and on the west by High street, in the city of Columbus, county of Franklin, and State of Ohio.

The said affidavit was in all respects in conformity with law, and was duly filed, as aforesaid, and the same became and was a valid and subsisting lien upon said premises from and after the 16th day of April, 1895, being the date on which the first item of material mentioned in said affidavit was furnished; that there is now due to complainants, Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madelaine F. Laughlin, Willis L. King, Henry A. Laughlin,
39 James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips and Benjamin F. Jones, and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hillard and Thomas M. Jones, Jr., partners doing business under the firm name and style of Jones and Laughlins, Limited, by virtue of said lien the sum of $11,410.02, with interest thereon from the 28th day of January, 1896, amounting in all at this date to $15,158.21; that said amount is due said complainants for and on account of said lien, and for and on account of materials furnished in and about the construction of the building of the defendant, The Great Southern Fire Proof Hotel Company, upon said premises hereinbefore described, and that no part of said amount has ever been paid to these complainants.

The court further finds that said amount was at the date complainants furnished said materials, and is now, a valid and subsisting lien upon said premises and that the complainants are entitled to have said lien foreclosed.

It is, therefore, ordered and decreed that unless the costs of this

suit, and the amount found due the plaintiffs, with interest from the 19th day of June, 1901, shall be paid within ten days from the date of this decree, and said lien and the said defendant's equity of redemption in said premises shall be foreclosed, and an order shall be issued to the marshal of this district, directing him to appraise, advertise and sell said premises according to law, and that of his proceedings in said premises he make due return to this court, and bring herein the proceeds of said sale; and the court further reserves all questions as to priority of liens and as to the several amounts due the other defendants in this suit for further consideration.

To each and every of which said findings, orders and decrees of the court the said defendant, The Great Southern Fire Proof Hotel Company, in open court and in the presence of and with notice to the attorneys and solicitors of the complainants and each of them, excepts and gives notice of and prays an appeal from each and every of said findings, orders and decrees to the United States circuit court of appeals for the sixth circuit, and gave notice for its desire to give a supersedeas bond to stay execution, order of sale and other proceedings on the decree herein rendered until the final termination of such appeal; and such appeal is granted and the court allows an appeal to said the United States circuit court of appeals for
40 the sixth circuit, and fixes the amount of said appeal bond in the sum of $—, to be conditioned to the effect that if the said The Great Southern Fire Proof Hotel Company shall prosecute said appeal to effect and pay all damages and costs rendered against it in case said judgment and decree be affirmed, and in case it make its plea and appeal good, said obligation then to be void, else to remain in full force and virtue; which said bond is to be approved by the court, and when so given and approved, all further proceedings in this court be suspended and stayed until the determination of said appeal, and said cause in said United States circuit court of appeals, the amount of the said supersedeas bond being fixed at the above amount in consideration of the appellant, The Great Southern Fire Proof Hotel Company, and the said the complainants having stipulated and agreed that the said appellant shall deposit with the proper officer of the court a sum sufficient to pay the costs and decree, if any, which may hereafter be rendered herein and adjudged against said appellant on the final determination of this cause in any court to which it may be carried—said sum to be applied to the payment of the decree heretofore herein rendered against appellant in case such decree is ultimately affirmed on the final determination of this cause.

And afterwards, to-wit, on the 20th day of August, A. D. 1901, the following petition on appeal was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Petition on Appeal.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY ET AL., Defendants.

Petition on appeal.

The above named defendants, The Great Southern Fire Proof Hotel Company, now comes and conceiving itself to be aggrieved by the order and decree made and entered against — on or about the 20th day of August, 1901, in the above entitled cause, in favor of
41 Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Willis D. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hillard and Thomas N. Jones, Jr., partners doing business under the firm name and style of Jones & Laughlin, Limited, complainants herein, wherein and whereby, among other things, it was and is ordered and decreed that the affidavit for a mechanic's lien filed by the complainants upon the premises owned by the defendant, The Great Southern Fire Proof Hotel Company, and the amended bill of complaint, of the complainant, and in said decree specifically mentioned and described, was and is in all respects in conformity to law, and was and is a valid and subsisting lien upon said premises from the date of the first item in said affidavit contained, and there then remains due and owing unto the said complainants, by virtue of said lien $15158.21 and said amount is a valid and subsisting lien upon said premises of this defendant hotel company, and that the said defendants are entitled to have said lien foreclosed, and that unless the costs in this action, amounting to $—, and the amount found due the said complainants, amounting, on the 19th day of July, 1901, to $15158.21, to be paid within ten days from the date of said decree, that the mechanic's lien claimed by the said complainants, in the amended bill of complaint, on the premises of the defendant in said bill of complaint, and in said decree specifically described, the equity of redemption of this defendant, The Great Southern Fire Proof Hotel Company, in its premises and real estate in said decree and amended bill of complaint described, be foreclosed, and that an order issue to the marshal of said district to appraise, advertise and sell said premises according to law, and that of the proceeds of said premises he make due returns to said court, and bring into said court the proceeds of sale, doth hereby appeal from said order and decree to the honorable United States circuit court of appeals of the sixth district, under and according to the

laws of Congress and the statutes in such cases made and provided, for the reasons specified in the assignment of errors filed herein, and it prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the
42 said the United States circuit court of appeals for the sixth circuit, and that an order be made fixing the amount of security, to-wit, a supersedeas bond, which the said The Great Southern Fire Proof Hotel Company shall give and furnish upon said appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the said the United States circuit court of appeals for the sixth circuit.

J. E. SATER,
D. F. PUGH,
Attorney- and Solicitors for the Appellant, The Great Southern Fire Proof Hotel Company.

And afterwards, to-wit, on the 20th day of August, A. D. 1901, the following assignment of errors was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Assignment of Errors.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL.
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation, *et al.*

Now comes the respondent, The Great Southern Fire Proof Hotel Company, designated in the pleadings as a defendant herein, and says that the judgment and appeal rendered in this case against it, and in favor of Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madelaine F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hillard and Thomas M. Jones, Jr., partners doing business under the firm name and style of Jones & Laughlins, Limited,
43 by the circuit court of the United States, for the southern district of Ohio, eastern division, is erroneous and against the just rights of the said The Great Southern Fire Proof Hotel Company, for the reasons hereinafter following, and files the following assignment of error on which it will rely:

I.

The United States circuit court for the southern district of Ohio, eastern division, erred in overruling the demurrer interposed by the said The Great Southern Fire Proof Hotel Company to the amended bill of complaint of the said complainants filed in said cause.

II.

The said court erred in holding and decreeing the mechanic's lien law of Ohio, especially each and every of the sections thereof known as sections 3184 (91 O. L., page 135) 3185 (Bates Annotated Ohio Statutes), and 3185 (*a*) (91 O. L., page 137), under which said sections the complainants seek to enforce the purported lien set out in their said amended bill of complaint, to be constitutional, and not in contravention and violation of section one (1) of the bill of rights of the constitution of the State of Ohio, and of section one (1), article fourteen (14) of the Constitution of the United States.

III.

The said court erred in not following the decision of the supreme court of the State of Ohio in the cases of Palmer & Crawford *v.* Tingle, and Young *v.* Lion Hardware Company, (55 O. S. 423) holding the said mechanic's lien law unconstitutional, to-wit, sections 3184 (91 O. L., p. 135), 3185 (Bates Annotated Ohio Statutes) and 3185 (*a*) (91 O. L., p. 137) under which the said complainants claimed and sought to enforce the purported lien set out in their said amended bill of complaint, which said decision was rendered, prior to the commencement of this action.

The said court erred in holding and decreeing that the pretended lien claimed by the said complainants, set forth in their said amended bill of complaint, and which it seeks to enforce, is sufficient in substance and form, and in compliance with the statutory provisions and requirements of the said mechanic's lien law of Ohio governing the mode of procedure, and specifying the requisite steps to be taken to obtain a mechanic's lien, especially section 3185 (Bates Annotated Ohio Statutes).

44 V.

The said court further erred in holding and decreeing as to the substance, sufficiency and form of said purported mechanic's lien.

(*a.*) That the statement of the amount and value of the labor, machinery and material claimed to have been furnished by the said complainants, as set forth in their pretended lien, and the affidavit to procure the same, is itemized, or sufficiently itemized, and made to comply with the provisions of the said mechanic's lien law of Ohio, section 3185 of the Revised Statutes of Ohio.

(*b.*) That the affidavit filed for and in behalf of said complainants, and the purported mechanic's lien based on, and claimed on

account of, said affidavit, sufficiently states the terms and conditions of said company's contract with William J. McClain, the original contractor for the construction of said hotel company's building, and is in compliance with the provisions and requirements of said mechanic's lien law of Ohio, section 3185 of the Revised Statutes of Ohio.

VI.

The said court erred in overruling the motion filed herein by the said The Great Southern Fire Proof Hotel Company for leave to file an amended answer to the amended bill of complaint of the said complainants, and in refusing to permit said amended answer to be filed.

VII.

The said court erred in rendering a judgment and decree in said cause in favor of the said complainants, and against the said The Great Southern Fire Proof Hotel Company.

VIII.

The judgment and decree rendred by said court should have been rendered in favor of said The Great Southern Fire Proof Hotel Company, and against the said complainants.

Wherefore, the said appellant, The Great Southern Fire Proof Hotel Company, prays that the said decree and holdings of said the *Great Southern Fire Proof Hotel Company, prays that the said decree and holdings of said the* circuit court of the United States, southern district of Ohio, eastern division, be reversed and that the said court may be directed to enter a decree dismissing the
45 amended bill of complaint of the said complainants. And for all such other and further orders as the justice and equity of this cause may require.

J. E. SATER,
D. F. PUGH,
Solicitors and Attorneys for the Appellant, The Great Southern Fire Proof Hotel Company.

And afterwards, to wit, on the 20th day of August, A. D. 1901, the following appeal allowed was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Entry E, 188.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY ET AL., Defendants.

Entry: Appeal allowed—Bond fixed.

This day came The Great Southern Fire Proof Hotel Company, defendant herein, by its attorneys, J. E. Stater and D. F. Pugh, and present its petition for the allowance of an appeal from the judgment and decree lately rendered against the said The Great Southern Fire Proof Hotel Company in favor of Benjamin F. Jones, George F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madelaine F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr. James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, Jr., partners doing business under the firm name and style of Jones & Laughlin, Limited, in the circuit court of the United States, southern district of Ohio, eastern division, in a suit pending in said court between Benjamin F. Jones, *et al.*, complainants, and The Great Southern Fire Proof Hotel Company, defendants, which petition for allowance of appeal was and is accompanied by an assignment of errors, and which petition prays that an order be made fixing the amount of security which defendant shall give of said security all further proceedings of this court
46 & 47 be suspended and stayed until the determination of said appeal and of said cause by the United States circuit court of appeals in and for the sixth judicial circuit; and said petition and appeal having this day been, and now being duly granted and allowed, the amount of said supersedeas bond is hereby fixed at $300, the appellant also to deposit with the proper officer of this court a sum sufficient to pay all the costs and the decree, if any, which may be rendered against it hereafter in any court to which this cause may be carried on the final determination thereof.

Now, therefore, it is ordered that upon the said The Great Southern Fire Proof Hotel Company filing with the clerk of this court a good and sufficient bond in the sum of $300.00 to the effect that if the said The Great Southern Fire Proof Hotel Company shall prosecute said appeal to effect and pay all damages and costs rendered against it, in case said judgment and decree shall be affirmed and in case it fail to make its appeal plea good, then the said obligation shall be void, else to remain in full force and virtue, the said bond to be approved by the court, and all further proceedings in this court be, and they are hereby suspended and stayed until the determination of said appeal and said cause in the said The United States circuit court of appeals.

—— ——, *Judge.*

Dated August 20th, 1901.

48 UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true and complete transcript of the proceedings had by and before said court, in the Great Southern Fire Proof Hotel Company matter, and as the same appears of record and on file in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Columbus, Ohio, this 28th day of September, A. D. 1901.

[SEAL.]

B. R. COWEN, *Clerk,*
By JANIE W. F. COWEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

To Benjamin F. Jones, George F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madeline F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hillard, and Thomas M. Jones, Jr., partners doing business under the firm name and style of Jones & Laughlins, Limited, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth
49 circuit, to be holden at the city of Cincinnati, in said circuit, on the* 29th day of September next, pursuant to an appeal, filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein The Great Southern Fire Proof Hotel Company, a corporation, — appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 30th day of August, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-sixth.

C. D. CLARK,
Judge of the United States District Court within and for the Eastern and Middle Districts of Tennessee, Sitting and Holding Circuit Court by Designation.

* Not exceeding 30 days from the day of signing.

Return.

Received this writ at Columbus, O., on September the 2nd, 1901. And on the 4th day of September, 1901, I served the same on the within-named Benjamin F. Jones, George F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madaline F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips and Benjamin F. Jones and William L. Jones, trustees, by personally handing to Albert L. Thurman, the attorney for the within-named persons, true copies of the same with all the indorsements, for each of the within-named persons at Columbus, O.

V. J. FAGIN,
U. S. Marshal, S. D. O.,
By ALBERT BAUER, *Deputy.*

Fees.

Thirteen services	$26 00
Thirteen copies	6 50
Mileage, 3 miles	18
Total	$32 68

Security for costs furnished.

50 Marshal's civil docket No. 1742. No. 796. United States circuit court, southern district of Ohio, eastern division. Benjamin F. Jones, *et al.*, complainants, *vs.* The Great Southern Fire Proof Hotel Co., *et al.*, defendants. Citation. Filed Sept. 6, 1901. B. R. Cowen, clerk. J. E. Sater, attorney.

51 United States Circuit Court of Appeals, Sixth Circuit.

GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, Appellant,
vs.
BENJAMIN F. JONES ET AL., Appellees.
} No. 1034.

Stipulation Regarding Correction of Printed Record.

It appearing that there are errors in the printed record filed herein on Dec. 9th, 1901, it is hereby stipulated and agreed by and between J. E. Sater and D. F. Pugh, as solicitors for The Great Southern Fire Proof Hotel Company, appellant, and Outhwaite, Linn & Thurman, as solicitors for Benjamin F. Jones and others, appellees, that such printed record shall be corrected in the following respects and in the following manner, to-wit:

1st. On page 21 the words "C. B. Wood *vs.* The Great Southern Fire Proof Hotel Company *et al.*, No. 968" shall be stricken out by drawing across the same red ink lines.

2nd. That all of page 21 commencing with and following the words "and afterward, to-wit, on the 18th day of June, A. D. 1901," shall be crossed out by red ink lines and that as all the matter in such printed record commencing with the top of page 22 and ending with the bottom of page 34 is improperly in said printed record, pages from 21 to 35 shall be riveted together so that the court need not examine the same and that the first half of page 35 ending with the words "by R. H. Wilcox, dpt.," shall be ruled out with red ink lines.

3rd. That the bond appearing on the last half of page 46 and extending over page 47 and ending near the top of page 48 of such printed record shall be stricken out by drawing across the same lines made with red ink for the reason that such bond is the one given by the Great Southern Fire Proof Hotel Company to the American Blower Company.

4th. That a copy of the supersedeas bond and also of the agreed statement of facts entered into between said solicitors prior to
52 the trial of this cause in the circuit court, and on which this cause was tried in that court shall be printed and made a part of the printed record and attached at the end of the printed record filed on December 9th, 1901, and shall be a part thereof as fully as if the same had been originally made a part of such printed record.

6th. That the word "cross bill" as it appears in the index on the first page of such printed record shall be stricken out with red ink and instead thereof shall be written the word "opinion."

J. E. SATER &
D. F. PUGH,
Solicitors for The Great Southern Fire Proof Hotel Company, Appellant.
OUTHWAITE, LINN & THURMAN,
Solicitors for Benjamin F. Jones and Others, Appellees.

No. 1034. Circuit court of appeals, sixth circuit. The Great Southern Fire Proof Hotel Company, appellants, *vs.* Benjamin F. Jones, *et al.*, appellees. Stipulation regarding correction of printed record. Filed Jan. 28, 1902. Frank O. Loveland clerk.

No. 1034. United States circuit court, southern district of Ohio, eastern division. Benjamin F. Jones, *et al.*, *vs.* The Great Southern Fire Proof Hotel Company, *et al.* Agreed statement of facts between hotel company and Jones & Laughlins, Limited. Filed June 18, 1901. B. R. Cowen, clerk. Filed Jan. 28, 1902. Frank O. Loveland, clerk.

53 In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

To the honorable judges of the circuit court of the United States for the southern district of Ohio, eastern division, sitting in equity:

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madelain F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin J. Jones and William L. Jones, Trustees under the Last Will and Testament of Thomas M. Jones, Deceased, for William L. Jones, Mary J. Hilliard, and Thomas M. Jones, Jr., Partners Doing Business under the Firm Name and Style of Jones & Laughlins, Limited, Complainants, } No. 796.

vs.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation; The Akron Hydraulic Press Brick Company, a Corporation; Joseph Sosman and Perry Landis, Partners Doing Business under the Firm Name and Style of Sosman & Landis; The American Blower Company, a Corporation; The United States Mortgage & Trust Company, a Corporation, Defendants.

It is hereby stipulated and agreed by and between the attorneys for The Great Southern Fire Proof Hotel Co., one of the defendants herein, and the attorneys for Jones & Laughlin's, Limited, complainants herein, that the following, marked "Exhibit One," is a true copy of the affidavit for a mechanic's lien and of the account thereto attached made a part thereof and marked "Exhibit A," which was filed by the said Jones & Laughlin's, Limited, in
54 the office of the county recorder of Franklin county, Ohio, on April 2nd, 1896, and recorded in Lien Record No. 9, pages 99–100, in said recorder's office, for the purpose of obtaining a mechanic's lien on the property of the said hotel company and being the instrument referred to in the amended bill of complaint of the said Jones & Laughlin's, Limited, as their mechanic's lien.

It is also stipulated and agreed by and between said attorneys that on the trial of the issues herein as between said defendants to wit, The Great Southern Fire Proof Hotel Company and the said Jones & Laughlin's, Limited, that the aforesaid copy of such affidavit and of the exhibit attached thereto and made a part thereof, may be used as evidence in so far as competent and to the same effect as if the record thereof were offered in evidence and as if formal proof had been made thereof.

The said The Great Southern Fire Proof Hotel Company, while waiving all such formal proof as to such affidavit and exhibit,

objects to the said affidavit and the copy thereof as incompetent, immaterial and irrelevant, for the reason that the account marked "Exhibit A" must be complete and show its sufficiency on its face, and can not be aided or helped by any averment, allegation or recital contained in the affidavit itself.

It is further stipulated and agreed that the term "ton of structural steel" used in the contract incorporated in said "Exhibit One," means a ton of two thousand (2,000) pounds.

The said The Great Southern Fire Proof Hotel Company also objects to said stipulation as to the number of pounds in a ton of structural steel as used in the contract, as incompetent, immaterial and irrelevant, for the reason that neither the claim for a lien or the account marked "Exhibit A" can be supplemented by evidence extraneous and outside of the claim of and account for the lien itself.

All questions as to relevancy and competency of such affidavit and exhibit, and each and every part thereof so to be offered at the hearing of this case, shall be considered reserved and as not waived whether specifically enumerated as above or not.

It is also stipulated and agreed that either or both of the parties hereto may offer such other and further evidence as such party may have.

OUTHWAITE, LINN & THURMAN,
For Complainant.

J. E. SATER AND
D. F. PUGH,
Attorneys and Solicitors for The Great Southern Fire Proof Hotel Company.

55 "EXHIBIT ONE."

The Great Southern Fire Proof Hotel Company
to
Jones and Laughlin's, Ltd.

STATE OF PENNSYLVANIA, *County of Allegheny,* } ss:

Personally before me, a notary public in and for said county appeared B. F. Jones, Jr., who being by me first sworn, makes oath and says that he is one of the members of the limited partnership association doing business under the name and style of Jones and Laughlins, Limited; that said association is a limited partnership association organized under the act of the General Assembly of Pennsylvania, approved June 2nd, 1874, entitled, "An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association except under certain circumstances," and that he is one of the managers of said association.

Affiant further makes oath and says that the annexed statement marked "A," which is made a part of this affidavit, is a true and correct itemized statement of the amount and value of the labor performed and materials furnished by said Jones and Laughlins, Limited, to, for, in and about the construction, erection and completion of a certain building in the city of Columbus, Franklin county, Ohio, known as the Great Southern hotel, said building being a fire proof building containing a hotel building, a theater and business rooms and being erected by a certain corporation organized under and by virtue of the laws of the State of Ohio, known as the Great Southern Fire Proof Hotel Company; said labor and materials so furnished to, in, for and about the construction, erection and completion of said building were furnished at the times in said annexed statement mentioned under and by virtue of a contract in writing entered into by and between said Jones and Laughlins, Limited, and one William J. McClain, who was at the times herein mentioned the principal contractor engaged in erecting and in constructing said building for said The Great Southern Fire Proof Hotel Company, a copy of which contract between the said William J. McClain and the — Jones and Laughlins, Limited, is as follows, viz.:

56 COLUMBUS, OHIO, *Dec.* 13*th*, 1894.

W. J. McClain, Columbus, Ohio.

DEAR SIR: We agree to furnish you nine hundred (900) tons structural steel for the Great Southern hotel, Columbus, Ohio, fitted ready for erection in accordance with the revised plans and specifications, for the sum of thirty-two thousand five hundred and eighty ($32,580.00) dollars delivered F. O. B. cars Columbus.

We also further agree that if an additional quantity of steel is required more than the 900 tons above specified that we will furnish the same at the rate of $1.81 per hundred pounds delivered at Columbus, or if a less amount is required than the 900 tons, then we will allow deduction from the contract price at the rate of $1.81 per hundred pounds for the difference between the amount shipped and the 900 tons above specified.

It is understood that we can commence shipment at once and that all the orders will be completed before August 1st, 1895.

Terms of payment are cash, to be paid on the fifth of the month following shipment.

Yours truly,

JONES AND LAUGHLINS, LIMITED.

(Signed) R. GERRY.

The above proposition is this day accepted.

(Signed) W. J. McCLAIN.

The values of said labor and materials are as stated in said itemized statements hereto annexed and the same are just and reasonable.

There are no credits nor set-offs against the same excepting as stated in said annexed statement and there remains due and unpaid thereon to the said Jones and Laughlins, Limited, from the said William J. McClain and from the said The Great Southern Fire Proof Hotel Company the sum of eleven thousand four hundred and ten dollars and two cents ($11,410.02), with interest thereon from January 28th, 1896.

At the time said contract was entered into and said labor was performed and said materials furnished, the said The Great Southern Fire Proof Hotel Company was the owner of said building and the lots of land upon which the same are situated, which are described as follows, viz., to wit: Situate in the city of Columbus, county of Franklin and State of Ohio, and being inlots numbered 352,
57 353 and 354 in the town (now city) of Columbus, Franklin county, State of Ohio, as the said inlots are marked and delineated upon the original plat of said town (now city).

Said Jones and Laughlins, Limited, are the owners of said account and claim for labor and materials hereto attached; said Jones and Laughlins, Limited, claim a lien upon said premises to secure payment of said indebtedness.

B. F. JONES, JR.

Sworn to before me and subscribed in my presence this 31st day of March, 1896, by the above named B. F. Jones, Jr.

[SEAL.] WILLIAM C. MORELAND, JR.,
Notary Public.

"A."

PITTSBURG, PA., *M'ch 21st*, 1896.

W. J. McClain, Columbus, Ohio, bought of Jones and Laughlins, Limited.

1895.	
April 17, mdse	545 10
April 22, mdse	501 21
May 1, mdse	882 55
May 4, mdse	432 12
May 11, mdse	606 30
May 20, mdse	737 82
May 25, mdse	670 46
May 29, mdse	546 71
June 1, mdse	621 00
June 5, mdse	418 98
June 11, mdse	491 91
June 17, mdse	629 61
June 18, mdse	681 66
June 20, mdse	11 37
June 21, mdse	496 49
July 3, mdse	766 83

July 13, mdse	513 25	
July 17, mdse	618 24	
July 20, mdse	632 12	
July 29, mdse	520 56	
Aug. 2, mdse	664 85	
Aug. 5, mdse	719 60	
Aug. 8, mdse	566 58	
58 Aug. 12, mdse	453 04	
Aug. 16, mdse	507 19	
Aug. 20, mdse	830 85	
Aug. 26, mdse	823 71	
Aug. 28, mdse	1,270 48	
Aug. 31, mdse	581 92	
Sept. 9, mdse	2,368 40	
Sept. 10, mdse	681 08	
Sept. 14, mdse	934 66	
Sept. 20, mdse	461 75	
Sept. 26, mdse	606 56	
Sept. 28, mdse	636 72	
Oct. 1, mdse	15 42	
Oct. 3, mdse	892 14	
Oct. 7, mdse	1,616 69	
Oct. 9, mdse	1,142 99	
Oct. 12, mdse	932 39	
Oct. 15, mdse	1,126 28	
Oct. 16, mdse	489 14	
Oct. 17, mdse	694 92	
Oct. 19, mdse	922 39	
Oct. 23, mdse	753 21	
Oct. 23, mdse	1,060 18	
Oct. 24, mdse	698 12	
Oct. 24, mdse	1 60	
Oct. 25, mdse	701 66	
Oct. 28, mdse	892 92	
Oct. 29, mdse	612 70	
Oct. 31, mdse	759 76	
Nov. 4, mdse	650 05	
Nov. 6, mdse	847 17	
Nov. 7, mdse	584 07	
Nov. 11, mdse	519 72	
Nov. 21, mdse	668 81	
Nov. 25, mdse	790 86	
Nov. 26, mdse	495 29	
Dec. 3, mdse	575 72	
Dec. 11, mdse	16 56	
Dec. 31, mdse	1,054 31	
1896.		
Jan'y 10, mdse	350 07	
Jan'y 28, mdse	42	
		43,296 74

1895.			
May 9, credit by cash	1,046	31	
June 10, credit by cash	3,875	96	
July 26, credit by cash	3,351	02	
Aug. 29, credit by cash	3,051	00	
59 Oct. 5, credit by cash	10,000	00	
Oct. 31, by mdse	24	5(	
Nov. 21, by mdse		84	
Nov. 27, by mdse	1	17	
Nov. 27, by mdse	6	76	
Dec. 23, by mdse	10,000	00	
1896.			
Mar. 20, mdse allowance	527	16	
			31,886 72
			$11,410 02

Filed Ap'l 2nd, 1896, at 4:50 p. m. Recorded Ap'l 10th, 1896.
J. W. PETERS, *Recorder*,
By R. H. WILCOX, *D'p'ty*.
S.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY *et al.*, Defendants. } No. 796.

Supersedeas Bond.

Know all men by these presents, that we, The Great Southern Fire Proof Hotel Company, of Columbus, Ohio, principal, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the above-named complainants, Benjamin F. Jones, George F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madeline F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hilliard and Thomas M. Jones, Jr., partners, doing business under the firm name and style of Jones & Laughlins, Limited, in the full and just sum of three hundred dollars ($300.00), to be paid to the said Benjamin F. Jones, George F. Jones, Jr., Mary J. Laughlin, Mary McM. Laughlin, Madeleine F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phil-
60 lips, and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, de-

ceased, for William L. Jones, Mary J. Hilliard and Thomas M. Jones, Jr., partners doing business under the firm name and style of Jones and Laughlins, Limited, their attorneys, successors, administrators, executors or assigns, for the payment of which well and truly to be made we bind ourselves and each of us, our successors, heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 21st day of August, in the year of our Lord, one thousand nine hundred and one.

Whereas, the above named, The Great Southern Fire Proof Hotel Company, lately at a session of the circuit court of the United States for the southern district of Ohio, eastern division, in a suit pending in said court between the said Benjamin F. Jones and others, complainants, and The Great Southern Fire Proof Hotel Company, and others, respondents and defendants, a judgment and decree was rendered against the said The Great Southern Fire Proof Hotel Company, in favor of said complainants, and the said The Great Southern Fire Proof Hotel Company having obtained an order allowing an appeal to the United States circuit court of appeals of the sixth district, to reverse the decree of the aforesaid suit, and filed a copy thereof in the clerk's office of said court, and a citation directed to the said Benjamin F. Jones, George F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Madelaine F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hilliard and Thomas M. Jones, Jr., partners doing business under the firm name and style of Jones and Laughlins, Limited, is about to be issued, if need be, citing and admonishing them to be and appear at the session of the United States court of appeals to be holden at the city of Cincinnati, in said circuit, on the — day of ——, 1901, the notice and granting of such appeal having beeu given and granted in open court in the presence and with the knowledge of the solicitors and attorneys of complainants.

Now, therefore, the condition of this obligation is such that if the said The Great Southern Fire Proof Hotel Company shall prosecute said appeal to and with effect, and answer and pay all dam-
61 ages and costs rendered against it, in case said decree shall be affirmed, and in case it fail to make its appeal and plea good, then the above obligation to be void; otherwise the same shall be and remain in full force and virtue.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY,
By NICHOLAS SCHLEE, *President.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By FRANK TALLMADGE, *Gen'l Ag't.*

Sealed and delivered in presence of:
Attest: H. B. ARNOLD, *Att'y.*

Approved:
C. D. CLARK,
U. S. District Judge, Sitting and Holding Circuit Court by Designation.

No. 1034. In the circuit court of the United States, southern district of Ohio, eastern division. No. 796. Benjamin F. Jones *et al.*, *vs.* The Great Southern Fire Proof Hotel Company, *et al.* Super sedeas bond. Filed Jan. 28, 1902. Frank O. Loveland, clerk. Copy.

62 And afterwards towit on October 2nd 1901, præcipe for appearance of counsel was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GREAT SOUTHERN FIRE PROOF HOTEL CO.
vs.
BENJAMIN F. JONES ET AL. } # 1034.

To the clerk of said court:

Please enter my appearance as counsel for the appellant.
J. E. SATER.

63 And afterwards towit on May 6th, 1902, an entry was made upon the journal of said court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GREAT SOUTHERN FIRE PROOF HOTEL CO.
vs.
JONES & LAUGHLIN. } # 1034. Before Lurton, Day, & Severens, J. J.

These causes coming on for hearing are argued for the Great Southern Fire Proof Hotel Co. by Mr. J. E. Sater and for Sosman & Landis by Mr. L. C. Addison and for Jones & Laughlin by Mr. T. P. Linn and further hearing continued until tomorrow.

And afterwards towit on May 7th, 1902, an entry was made in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GREAT SOUTHERN FIRE PROOF HOTEL CO. vs. JONES & LAUGHLIN. } # 1034.

These causes coming on for further hearing are argued for the Great Southern Fire Proof Hotel Co. by Messrs. J. E. Sater and D. F. Pugh and for the lien holders by Mr. T. P. Linn, and the cases are submitted.

64 And afterwards to wit on June 3rd 1902, a decree was entered in said cause clothed in the words and figures as follows:

Decree.

65 United States Circuit Court of Appeals for the Sixth Circuit.

GREAT SOUTHERN FIRE PROOF HOTEL CO. v. BENJAMIN F. JONES ET AL. } No. 1034.

Appeal from the circuit court of the United States for the southern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be and the same is hereby affirmed with costs.

66 And afterwards to wit on June 20th 1902, an opinion was filed in said cause which reads and is as follows:

Opinion.

67 Nos. 1031, 1032, 1034, and 1036.

United States Circuit Court of Appeals, Sixth Circuit.

GREAT SOUTHERN FIRE PROOF HOTEL CO., Appellant,
vs.
BENJAMIN F. JONES ET AL., Appellees.

GREAT SOUTHERN FIRE PROOF HOTEL CO., Appellant,
vs.
AMERICAN BLOWER CO., Appellee.

GREAT SOUTHERN FIRE PROOF HOTEL CO., Appellant,
vs.
AKRON HYDRAULIC PRESS BRICK CO., Appellee.

GREAT SOUTHERN FIRE PROOF HOTEL CO., Appellant,
vs.
GRAND RAPIDS SCHOOL FURNITURE CO., Appellee.

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

Submitted May 7, 1902; decided June 3, 1902.

Before Lurton, Day, and Severens, circuit judges.

These four separate appeals involve sub-contractors' liens asserted under a statute of Ohio against the property of the Great Southern Fire Proof Hotel Company at Columbus, Ohio.

The material facts common to all the cases are these:

By a contract dated October 10, 1894, one William J. McClain became the principal contractor for the complete construction of a large fire-proof hotel and opera house for the Great Southern Fire Proof Hotel Company, a corporation of the State of Ohio.

68 For the entire materials and work the hotel company agreed to pay the sum of $345,000.00.

The complainants in the suits below, for convenience, heard on appeal together, are all sub-contractors who did part of the work or furnished part of the materials used in the construction of said building, under contracts with the principal contractor, and who now assert liens on the said structure by virtue of the provisions of the law then in force, being an act passed April 13, 1894, and carried into Annotated Ohio Statutes as sections 3184, 3185 and 3185a.

The defenses were that the complainants had not complied with the terms and conditions of the law giving the lien claimed and that if they had done so that so much of the act of April 13, 1894, as gives a lien upon the property of an owner for materials supplied or labor performed at the instance of a principal contractor is void as in conflict with the organic law of Ohio. The court below found against both these defenses and granted the prayers of the several bills.

LURTON, circuit judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The hotel company objects to the claims of Jones and Laughlins, Limited, because they did not in their respective claims for liens file an "itemized statement or account," as required by section 3185, Bates' Statutes.

To secure the lien provided by the preceding section, section 3185, in substance, provides, that the person claiming the lien "shall, within four months of the time from performing such labor, or furnishing such machinery or material *file with the recorder of the county* * * * *etc., an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material* and a description of any promissory note or notes given for such labor, machinery or material, or any part thereof, with all credits and offsets thereon, *a copy of the contract, if it is in writing*, a statement of the amount and times of payment to be made thereunder and a description of the land * * * on which the house * * * or * * * structures may stand, * * * ; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item, etc."

The italics are ours.

The "itemized statement or account" made a part of the recorded affidavit filed, consisted of some sixty-four items, aggregating
69 $43,296.74, each item being dated. This account is then credited with $31,886.72, leaving a balance due of $11,420.02. The form of this account is as follows:

"PITTSBURG, PA., *March* 21, 1896.

W. J. McClain, Columbus, Ohio, bought of Jones & Laughlin, Limited.

1895.	
April 17. Merchandise	$545.10
April 22. Merchandise	501.21"

Sixty-two other items of "merchandise" under as many different dates then follow.

The objection is to the indefiniteness of this statement.

"Merchandise," say the appellants, is a trade term covering every form of movable, customarily bought and sold for gain, and from an account so stated it can not be told what kind of merchandise is

claimed to be "materials" used in or about the structure erected for the hotel company. "For all that can be known from this itemized statement," say counsel, "the Jones & Laughlin Company may have sold and delivered to McClain, the principal contractor, canary birds or fiddle strings for which they now claim a lien upon appellants' property as materials furnished for and on account of the structure erected for it."

This criticism is based upon the contention that this statement can not be read in connection with the affidavit filed by Jones & Laughlins of which the statement is a part.

The statute requires as a foundation for the lien the filing and recording of an affidavit "*containing* an itemized statement of the amount and value" * * * of the materials furnished and work done, and all credits, etc., and a "copy of the contract, if it is in writing," etc.

Thus the "contract," and the "itemized statement," are made parts of the lien affidavit. Looking to the Jones & Laughlin affidavit we find that a copy of the contract with W. J. McClain, who is averred to have been the principal contractor engaged in the erection of the appellants' hotel and opera house, is set out in full and made part of the affidavit and that it is averred that, "the annexed statement marked 'A' which is made part of this affidavit *is a true and correct itemized statement of the amount and value of the labor performed and materials furnished by said Jones & Laughlins, Limited*, to, for, in and about *the construction, erection and completion of a certain building, etc.*, * * * "said labor and materials so furnished to, in, for and
70 about the construction erection and completion of said building *were furnished at the times in said annexed statement mentioned under and by virtue of a contract in writing entered into, by and between* said Jones & Laughlin and one W. J. McClain, who was at the times herein mentioned the principal contractor, etc."

Now, if we read this itemized statement, as it was intended to be read, as a part of the recorded affidavit and in connection with the contract made a part thereof and fully set out, and in connection also with the other facts averred in said affidavit, we shall at once discover that Jones & Laughlins, Limited, had furnished the items of "merchandise" mentioned under a contract by which they were to furnish 900 tons of structural steel needed for the Great Southern Hotel Company, Columbus, Ohio, "fitted ready for erection in accordance with the revised plans and specifications for the sum of $32,580.00, delivered F. O. B. cars at Columbus." And that if more was needed it should be furnished "at the same rate of $1.81 per hundred, or if less amount is required than the 900 tons, a deduction to be allowed at the same rate." We shall see also that this affidavit avers that the statement "*is a true and correct itemized statement* of the amount and value of the labor performed and *materials furnished* in pursuance of said contract."

To refuse an interpretation of this "itemized statement" in the light of the other parts of the same affidavit would be to apply a different rule of construction to such a claim for lien from that ap-

plicable to every other kind of written document. The object in requiring the affidavit to include a copy of the written contract and an itemized statement of the labor performed is to give notice to all concerned of the claim and the basis upon which it stands.

Manifestly, the itemized statement may be supplemented by any more definite facts which appear to explain it and which constitute a part of the same recorded affidavit.

United States Blow Pipe Co. *v.* Spencer, 40 W. Va. 698; Knobbs Appeal, 10 Pa. St., 186; Bangs *v.* Berry, 82 Iowa 350; Bethell *v.* Lumber Co., 39 Kan., 230.

Construed in connection with the affidavit of which it is a part it is plain that "merchandise" stands for "structural steel," and that the item under date of April 17, 1895, is for an amount of structural steel delivered that day at $1.81 per hundred, $545.10.

If it is desired to know the number of pounds that day delivered the calculation is easy made.

71 That is certain which can be made certain. The case of Kern *v.* Pfaff, 44 Mo. App. 29. is not applicable because no sufficient facts appeared there to enable one to see without going beyond the affidavit what the price per roll was or the number of rolls of paper used.

The objection was untenable and was properly overruled.

2. The objection to the "itemized statement" filed by the American Blower Company as part of its affidavit is even more untenable.

The contract made a part of the affidavit, as required by the Ohio statute, shows an entire contract for a heating and ventilating plant, at the price of $3,989.00. The account filed as part of the affidavit is in these words:

"Sept. 19, to contract $3,989.00."

Then follow items not included in the contract and not objected to.

When the job is an entire one for an entire price an itemized statement is not required. This was the holding under former Ohio statutes containing a requirement substantially like the present statute. Davis *v.* Hines, 60 State 473; Thomas *v.* Huesman, 100 State 152, 158.

The cases relied upon by appellant of Lewis *v.* Cutter, 6 Mo. App. 54, and Nelson *v.* Withrow, 14 Mo. App. 270, arose under a statute which did not require the contract to be made a part of the filed affidavit.

By the very great weight of authority an itemized account is not necessary when the contract is for all the work or materials, or all of a specific part thereof, at a lumping or fixed price. 20 Am. & Eng. Ency. of Law, 2nd ed., p. 414, and cases there cited.

The next objection is that there is no date to show when this lien was attached. The date, June 29, 1896, at head of account is plainly the date when made up. The date September 19th at top and to the left of item "To contract $3,989.00" is by comparison with the contract referred to and part of the same affidavit, the date

when the "contract" was made. The next date below, November 4, is evidently the date of "first item" or beginning of the work.

3. The itemized statement of the Akron Hydraulic Press Brick Company is also objected to as vague. When read in connection with the other parts of the affidavit we see that the items are for brick of various quality and shape.

A statement of account is not insufficient simply because trade terms and book-keepers' abbreviations are used. No one
72 can fail to see that the items of the account are for different kinds of brick, the number and price of each being given.

It is not enough to render an itemized statement insufficient under such a lien statute that every one shall know just what kind of brick are meant by such an item as "745 jack arch," or "385 plain arch," or "9100 standard 2nds." If by reading the itemized statement in connection with the affidavit of which it is a part it can be seen that the items are for brick claimed to have been furnished under a contract written or oral the requirement of the statute of an "itemized statement" is substantially complied with. If such trade terms or book-keepers' abbreviations are unintelligible to the court, it is competent to hear evidence from those familiar with the trade as to their meaning. Wetmore *v.* Marsh, 31 Iowa 677; Henry *v.* Platt, 84 Mo. 237.

The objection that the contract is not set out in the affidavit is irrelevant because it is averred that the contract was not in writing, and the requirements of the statute is that a copy of the contract shall be set — "if in writing." The terms of the oral contract are sufficiently shown in connection with the account to be regarded as a substantial compliance with the statute.

4. It is next objected that the verification to the filed affidavit of the claim of the Grand Rapids School Furniture Company is not by an agent having knowledge of the facts. This is a pure assumption, based alone upon the fact that the agent verifying is also the counsel of record. The statute does not require that any particular person or agent shall make the statutory affidavit. Undoubtedly any one who deems himself acquainted with the facts may make the necessary affidavit. There is nothing in the transcript to indicate that the agent who made the affidavit in question was not acquainted with the facts to which he has sworn.

5. The next objection is that the act of April 13, 1894, under which for the first time an independent lien is given to sub-contractors who furnish materials or perform labor at the instance of the principal contractor was invalid, as in conflict with that provision of the Ohio bill of rights, art. 1, constitution of Ohio, which declares that "All men are by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety." The contention is that a law which enabled a principal contractor without the con-

sent of the owner to encumber the owner's property with an
73 independent lien in favor of a sub-contractor furnishing labor or materials for use by the principal contractor on the premises of the owner, without regard to the state of accounts between the owner and such contractor, is a law which so interfered with the owner's liberty of contract as to be in excess of the legislative power. In support of this view the appellant has cited and relied upon the opinion of the supreme court of Ohio, in Lion Hardware Company *v.* Young, *et al.*, 55 Ohio State 423, in which it was held that the extension of the Ohio mechanic's lien law by the act of April 13, 1894, so as to give an independent lien to sub-contractors was null and void as a violation of that liberty of contract declared to be an inalienable right by the Ohio bill of rights.

The decision of the Ohio supreme court was made after the liens here asserted had been perfected and in a cause to which none of the present lienors were parties. The bill of Benjamin F. Jones *et al.*, constituting the joint stock partnership of Jones & Laughlins, Limited, was demurred to by the hotel company for want of equity, and the demurrer was sustained and the bill dismissed, in an opinion delivered by the late District Judge Sage and reported in 79 F. R. 477. From the decree dismissing the bill Jones and others appealed to this court.

Upon that appeal this court, upon full consideration, held:

First. That a decision of the Ohio supreme court is not obligatory upon courts of the United States when thereby the validity of contracts between a citizen of the United States and a citizen of another State is affected, which were executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question. The decision thus made was in accordance with the opinion of this court in Louisville Trust Company *v.* City of Cincinnati, 22 C. C. A. 334, where, after stating the general rule to be that a court of the United States would adopt and follow the construction of a State constitution or statute announced by the highest court of the State, we said:

"A well grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends by the highest court of the State whose statute is involved. In such a case, if a court of the United States obtains jurisdiction of a question touching the validity, effect or obligation of such a contract, it will, while leaning to an agreement with the State court, exercise an independent judgment as to the validity and
74 meaning of such contract, although the meaning and validity of such statutes may be an element in the case, and will not be bound to follow opinions of the State court construing such statute if such decisions were rendered after the rights involved in the controversy originated."

Burgess *v.* Seligman, 107 U. S. 20–33; Pleasant Township *v.* Ætna Life Ins. Co., 138 U. S. 67–72.

Second. Upon the former appeal we also held after careful consideration, that "neither upon reason or authority are we able to come to an agreement with the Ohio court," and that "in the exercise of our independent constitutional jurisdiction we must declare our conscientious judgment to be that the Ohio statute was not void, and that complainants are entitled to relief thereunder." The decree of the circuit court was accordingly reversed and the cause remanded for further proceedings. Jones *v.* Great Southern Fire Proof Hotel Company, 30 C. C. A. 108–127. That case was taken by writ of certiorari to the Supreme Court, where it was held that a limited partnership doing business under a firm name and organized under the Pennsylvania act approved June 2, 1874, is not a corporation within the rule that a suit by or against a corporation in a court of the United States is conclusively presumed, for the purposes of the litigation, to be one against or by citizens of the State creating the corporation.

The citizenship of the stockholders in the firm of Jones & Laughlins, Limited, not otherwise appearing than by an averment that the plaintiffs were "members of the limited partnership association * * * organized under the Pennsylvania act" above mentioned, it was held, that it did not sufficiently appear that the plaintiffs were citizens of Pennsylvania. As the jurisdiction depended upon diversity of citizenship the judgments of the circuit court and of this court were reversed and the cause remanded for further proceedings, with directions that the plaintiffs be allowed to amend the pleadings upon the subject of the citizenship of the parties and that the court proceed to a final hearing on the merits if the amendment should show a case within the jurisdiction of the court. Great Southern Fire Proof Hotel Co. *v.* Jones, *et al.*, 177 U. S. 449. The question of the validity of the Ohio statute was not — all considered by the Supreme Court. The pleadings were accordingly amended so as to show a case within the jurisdiction of the court. Upon final hearing on pleadings and proof there was a decree for the com-
75 plainants in that case and a like decree in the other cases for convenience heard on appeal with that case.

For reasons presented in the former opinion of this court, cited above, we hold that the Ohio lien law of April 13, 1894, conferred upon the appellees a valid and enforceable lien, and the several decrees appealed from are accordingly affirmed with costs.

76 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Great Southern Fire Proof Hotel Co. *vs.* Benjamin F. Jones *et al.* No. 1034, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and

affixed the seal of said court, at the city of Cincinnati, Ohio, this 18th day of November A. D. 1902.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

77 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Great Southern Fire Proof Hotel Company, is appellant, and Benjamin F. Jones, George F. Jones, Jr., Mary F. Laughlin *et al.*, are appellees, No. 1034, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
78 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of January, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

Received the foregoing writ this 4th day of February, 1903, and returned the same on the same day pursuant to a stipulation filed in the United States circuit court of appeals for the sixth circuit, February 4th, 1903, which is in the following words:

"United States Circuit Court of Appeals, Sixth Circuit.

GREAT SOUTHERN FIRE PROOF HOTEL Company, Appellant,
vs.
BENJAMIN F. JONES ET AL., Appellees.
} No. 1034. Stipulation.

It is hereby stipulated and agreed between The Great Southern Fire Proof Hotel Company, appellant, by its attorneys, Messrs. John E. Sater and Henry Gumble, and Benjamin F. Jones, *et al.*, appellees, by their attorneys Messrs. Outhwaite, Linn & Thurman, that the certified transcript of the record on file in the Supreme Court of the United States shall be taken as a return to the writ of certiorari issued by the said Supreme Court on the 7th day of January, 1903, and the clerk of the United States circuit court of appeals for the sixth circuit is hereby requested by the parties hereto that a certified copy of this stipulation be sent up by him as his return to said writ of certiorari, which said writ of certiorari was issued in the case of The Great Southern Fire Proof Hotel Company, petitioner, *vs.* Benjamin F. Jones, *et al.*, respondents, by the said the Supreme Court of the United States on said 7th day of January, 1903.

JOHN E. SATER &
HENRY GUMBLE,
Att'ys for the Great Southern Fire Proof Hotel Co.
TALFANT P. LINN,
OUTHWAITE, LINN & THURMAN,
Att'ys for Respondents."

In testimony whereof I have hereunto set my hand and the seal of the United States circuit court of appeals for the sixth circuit, at Cincinnati, Ohio, this 4th day of February, 1903.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

79 [Endorsed:] File No. 18,745. Supreme Court of the United States. No. 165, October term, 1903. The Great Southern Fire Proof Hotel Co., *vs.* Benjamin F. Jones *et al.* Writ of certiorari. and return Filed Feb'y 11, 1903.

DEC 11 190
JAMES H. McKENNEY,
Cl

Supreme Court of the United States.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY,
PETITIONER,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. JONES, JR., MARY F. LAUGHLIN, MARY McM. LAUGHLIN, MAGDALINE F. LAUGHLIN, WILLIS L. KING, HENRY A. LAUGHLIN, JAMES LAUGHLIN, JR., JAMES B. LAUGHLIN, CHARLES C. BRIGGS, ELIZA L. PHILLIPS AND BENJAMIN F. JONES AND WILLIAM L. JONES, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF THOMAS M. JONES, JR., DECEASED, FOR WILLIAM L. JONES, MARY T. HILLIARD AND THOMAS M. JONES, JR., PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JONES & LAUGHLINS, LIMITED,
RESPONDENTS.

PETITION and MOTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

J. E. SATER,
HENRY GUMBLE,
Attorneys for Petitioner.

F. B. TOOTHAKER, Law Printer, 35-37 N. Third St., Columbus, O.

15261

Supreme Court of the United States.

THE GREAT SOUTHERN FIRE-FROOF HOTEL COMPANY,
PETITIONER,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. JONES, JR., MARY F. LAUGHLIN, MARY McM. LAUGHLIN, MAGDALINE F. LAUGHLIN, WILLIS L. KING, HENRY A. LAUGHLIN, JAMES LAUGHLIN, JR., JAMES B. LAUGHLIN, CHARLES C. BRIGGS, ELIZA L. PHILLIPS AND BENJAMIN F. JONES AND WILLIAM L. JONES, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF THOMAS M. JONES, JR., DECEASED, FOR WILLIAM L. JONES, MARY T. HILLIARD AND THOMAS M. JONES, JR., PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JONES & LAUGHLINS, LIMITED,
RESPONDENTS.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Sixth Circuit, to certify to the Supreme Court for its review and determination the case of The Great Southern Fire Proof Hotel Company, Appellant, vs. Jones et al., Appellees.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petitioner, The Great Southern Fire-Proof Hotel Company, respectfully shows to this Honorable Court as follows:

I.

Your petitioner is a corporation duly incorporated under the laws of the State of Ohio, and now is, and has ever been, since the date of its incorporation, a citizen of said state and of no other, having its residence and principal place of business in the city of Columbus in said state; that the respondents (appellees below), Benjamin F. Jones, George M. Lauglin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Magdaline F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, Jr., deceased, for William L. Jones, Mary T. Hillard and Thomas M. Jones, Jr., are members of a limited partnership association, doing business under the firm name and style of Jones & Laughlins, Limited (the respondents being hereinafter designated for convenience as Jones & Laughlins, Limited), which association was organized under the act of the General Assembly of Pennsylvania, approved June 23, 1874, entitled, "An Act authorizing the formation of a partnership association in which the capital subscribed shall alone be responsible for the debt of the association, except under certain circumstances," each and all of which members of said association have their residence and place of business in the city of Pittsburg, in the state of Pennsylvania, and said limited partnership, or association, and the members thereof, and each of them are and for many years past have been, citizens of said state, and of no

other, residing in the city of Pittsburg, in said state of Pennsylvania.

II.

Your petitioner, on the tenth day of October, 1894, made and entered into a contract in writing with one William J. McClain, as principal contractor, wherein the said McClain, in consideration of the sum of three hundred and forty-five thousand dollars ($345,000), agreed to do and perform all the proper and necessary work and labor, and provide and furnish all proper and necessary materials, machinery, apparatus and tools for, and would construct and complete and make tenantable for your petitioner, a fire-proof hotel and opera house building, and thereupon the said William J. McClain did forthwith proceed towards the construction of said improvement on your petitioner's real estate in the city of Columbus, Franklin county, Ohio, known as In-Lots Nos. three hundred and fifty-two (352), three hundred and fifty-three (353), and three hundred and fifty-four (354), in said city.

III.

On or about the thirteenth day of December, 1894, the said Jones & Laughlins, Limited, made and entered into a contract in writing with the said William J. McClain, the principal contractor with your petitioner, for the erection and construction of the aforesaid fire-proof hotel and opera house buildings, wherein it was provided that the said Jones & Laughlins, Limited, should furnish the said William J. McClain nine hundred (900) tons of structural steel for the said fire-proof hotel and opera house

building, said structural steel to be furnished for the sum of thirty-two thousand five hundred and eight dollars ($32,508.00), f. o. b. cars, Columbus, Ohio, and further provided that if more than the nine hundred tons named in said contract be required, that the said Jones & Laughlins, Limited, should furnish the same at the rate of $1.81 per hundred pounds delivered in said city, or if a less amount be required than the said nine hundred tons the said Jones & Laughlins, Limited, would allow a reduction from the contract price at the rate of $1.81 per hundred pounds for the difference between the amount shipped and the nine hundred tons above mentioned. Said Jones & Laughlins, Limited, were to commence shipping said steel at once, and should complete the delivery thereof before August 1, 1895. The terms of payment for said steel was cash to be paid on the fifth day of each month following shipment (page 9, printed record, Exhibit A).

IV.

In accordance with the terms of said written contract between the said Jones & Laughlins, Limited, and the said William J. McClain, the said Jones & Laughlins, Limited, claimed to have furnished to the said McClain structural steel for said building alleged to be of the value of forty-three thousand two hundred ninety-six and 74-100 dollars ($43,296.74), which structural steel was used by the said William J. McClain in and about the construction and erection of said fire-proof hotel and opera house building, and payments were made by the said William J. McClain to the said Jones & Laughlins, Limited, on account of the structural steel so claimed to

have been furnished in the sum of thirty-one thousand eight hundred eighty-six and 72-100 dollars ($31,-886.72), leaving a balance as claimed by the said Jones & Laughlins, Limited, due to them from the said McClain, of eleven thousand four hundred ten and .02-100 dollars ($11,410.02).

V.

On the twenty-first day of April, 1896, at 4:50 o'clock, p. m., within four months after having furnished the last of said structural steel to the said William J. McClain, the said Jones & Laughlins, Limited, for the purpose of obtaining a mechanic's lien on the real estate, hotel building and opera house hereinbefore mentioned, and owned by your petitioner, duly filed with the recorder of Franklin county, Ohio, an affidavit purporting to contain an itemized statement of the amount and value of the merchandise claimed to have been furnished by them under their contract with the said McClain, with the credits thereon, and a copy of the said written contract between them and the said McClain, and also a description of the aforesaid premises, and caused said affidavit to be recorded in Book No. 9, pages 99, 100 and 101, of the Records of Liens of said Franklin county, Ohio, in which said affidavit the said Jones & Laughlins, Limited, claim that there was due them from the said McClain on account of structural steel furnished by them to him, the said sum of eleven thousand four hundred ten and .02-100 dollars ($11,410.02), with interest from January 28, 1896, and that they have a mechanic's lien on the aforesaid premises of petitioner for said amount.

VI.

Your petitioner further says that at the time of the making of the contract between your petitioner and the said McClain, as principal contractor, for the erection and construction of said fire-proof hotel and opera house building, and also at the time of the filing by the said Jones & Laughlins, Limited, of their aforesaid affidavit to procure a mechanic's lien on the aforesaid premises, in said recorder's office, and at all intervening times, the mechanics' lien law of Ohio was embodied in Section 3184 of the Revised Statutes of Ohio (91 Ohio Law, p. 135), Section 3185, Revised Statutes of Ohio (Giaque, Bates, Smith and Benedict Edition), and Section 3185*a*, Revised Statutes of Ohio (91 Ohio Laws, p. 137), which said sections are as follows, to wit:

> "Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well or any other well, or performs labor of any kind whatsoever, in altering, repairing or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof or his agent, trustee, contractor or subcontractor, shall have a lien to secure the payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory, or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished,

and upon the interest, lease-hold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

"Sec. 3185. Such person in order to obtain such lien, shall, within four months of the time from performing such labor, or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, manufactory, or other buildings, or appurtenances, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter."

"Sec. 3185a. In all cases where the labor, material or machinery referred to in Sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon

between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material-men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section thirty-one hundred and eighty-four, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

VII.

On the ninth day of January, 1897, the said Jones & Laughlins, Limited, in their partnership name and not as individuals, filed their bill of complaint in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, in the Sixth Judicial Circuit, against the said The Great Southern Fire-Proof Hotel Company, and others to enforce its alleged mechanics' lien on the said real estate of the said hotel company, alleging among other things, the execution of their contract with the said McClain; the furnishing of structural steel to him for said building; the sum still due them; the insolvency of the said McClain; the filing of their affidavit with the recorder of said county, to procure a mechanics' lien, and praying that their alleged claim against the said McClain be declared a valid and subsisting lien on the premises of the said hotel company; that the liens on said property be marshaled, and the said premises sold and their claim satisfied out of the proceeds of such sale, and for all further proper relief.

Thereafter the solicitors of said hotel company on its

behalf, filed a demurrer to said bill of complaint, on the ground that said bill did not make or state such a cause as entitled said partnership to the recovery or relief sought and prayed for therein.

On the third day of May, 1897, the Honorable George R. Sage, District Judge of said court, found said demurrer well taken, and did allow and sustain the same, and the complainants, not desiring to amend their respective pleadings, the same were dismissed at their costs. The decision so rendered is found in the 79 Fed. Rep., 477.

Thereafter the said Jones & Laughlins, Limited, prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and on the sixteenth day of April, 1898, the said last named court rendered a judgment reversing the judgment of the said Circuit Court for the Southern District, Eastern Division, and remanded said cause to said last named court with directions to overrule said demurrer and require said hotel company to answer. The decision of the said Circuit Court of Appeals is reported in 86 Fed Rep., p. 370.

Thereupon the hotel company filed its petition and motion in this honorable court, praying that a writ of certiorari be issued and directed to the said United States Circuit Court of Appeals, commanding it to certify to this court a full and complete transcript of the record and of all the proceedings of said Circuit Court of Appeals in the case appealed thereto by the said Jones & Laughlins, Limited, against the said hotel company, and that said cause be reviewed and determined by this court, and for a reversal of the judgment of the said Circuit Court of Appeals in said cause and for all proper relief.

Thereupon said cause was certified to this court, and

on the ninth day of April, 1900, the judgment of the said Circuit Court of Appeals and the said Circuit Court were reversed, and the said cause was remanded to said Circuit Court with direction that the said Jones & Laughlins, Limited, should be permitted to proceed to a final hearing providing they were able to amend their pleadings upon the subject of citizenship of the parties so as to come within the rule announced by this honorable court. The decision so rendered by this honorable court is reported in the 177 U. S., 449.

VIII.

On the twenty-first day of June, 1900, the said Benjamin F. Jones, George M. Laughlins, Benjamin F. Jones, Jr., Mary F. Laughlins, Mary McM. Laughlins, Willis L. King, Henry A. Laughlins, James Laughlins, Jr., James B. Laughlins, Charles C. Briggs, Eliza L. Phillips, Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hilliard and Thomas M. Jones, partners, doing business under the firm name and style of Jones & Laughlins, Limited, as individuals, filed their amended bill of complaint in the Circuit Court of the United States for the Eastern Division, and the Southern District of Ohio, in the Sixth Judicial Circuit against the Great Southern Fire-Proof Hotel Company and certain others who claim liens on said premises, which amended bill recites that each and every of said respondents is a citizen and resident of the state of Pennsylvania, and otherwise contains the same averments and prays the same relief as the original bill of complaint mentioned in paragraph VII, *supra*.

The solicitors of the said hotel company on the seventeenth day of July, 1900, filed a demurrer to said amended bill of complaint for the same reason, and on the same ground and in the same form as were set forth and as appear in the demurrer filed by said hotel company to the original bill filed by Jones & Laughlins, in their partnership name, and as recited in paragraph VII, *supra*. The Circuit Court, feeling itself bound by the decision of the Circuit Court of Appeals, overruled said demurrer, to which ruling your petitioner excepted.

IX.

The Great Southern Fire-Proof Hotel Company, believing the respondents had not complied with the statutory requirements necessary to procure a lien, and also that the lien asserted on account of the unconstitutionality of the Ohio Mechanics' Lien law, is invalid, filed its answer to the amended bill and admitted the filing with the Recorder of Franklin county, Ohio, of what purports to be an affidavit to obtain a mechanics' lien, and alleged that said affidavit contains no itemized statement of the amount and value of materials furnished and labor performed, but merely states that on certain days said McClain bought of respondents merchandise with a value set opposite to each item, and does not state the character, kind or amount of the merchandise so bought, and that they did not have or acquire a mechanic's lien upon the real estate of said hotel company.

Said hotel company also averred that the affidavit mentioned in said amended bill was filed and their alleged mechanics' lien upon the Great Southern Fire-Proof Hotel Company's said real estate was claimed pursuant

to and under the right which was conferred by Sec. 3184 of the Revised Statutes of Ohio (91 O. L., 135), Sec. 3185, R. S. of Ohio (Giaque's, Bates' or Smith & Benedict's edition), and Sec. 3185*a*, R. S. of Ohio (91 O. L., 135), which statutes are so far as they attempt to give a lien for materials or labor obtained by the contractor from a sub-contractor, materialman or laborer, unconstitutional and void in that they violate the inalienable right of enjoying liberty and acquiring property granted by Sec. 1 of the Bill of Rights of the Constitution of the State of Ohio; that on December 8, 1896, the Supreme Court of the state of Ohio, being the highest court of the state, determined and adjudged that said statutes, so far as they give a lien on the property of the owner to sub-contractors, laborers and those who furnish machinery, material, or time to the contractor, were unconstitutional and void, because they contravene and violate the provisions of said first section of said Bill of Rights of the Constitution of Ohio, in the cases of Palmer & Crawford v. Tingle, and Young v. Lion Hardware Company, 55 O. S. Rep., 423.

That said decision was rendered in cases which involved alleged rights under state statutes and that it determined the validity of the state statutes under the constitution of the state of Ohio, and that the United States Courts should follow the decision of the Supreme Court of Ohio.

The said The Great Southern Fire-Proof Hotel Company further averred that it seeks relief against the attempt on the part of the complainants to enforce against it the said statutes of Ohio, because the operation of said statutes, if permitted, would take from said company its

property without due process of law, and deny to it the equal protection of the law, in contravention and violation of the provisions of the Constitution of the United States, and are especially contrary to and in violation of Sec. 1 of Art. XIV, of the amendments to the Constitution of the United States, and prayed the court to decree that the aforesaid sections of the Revised Statutes of Ohio are unconstitutional and void, for a dismissal without costs and other proper relief.

The complainants filed their replication to such answer, and thereafter the respondents (complainants below) and The Great Southern Fire-Proof Hotel Company entered into an agreed statement of facts or stipulation which fully appears on pages 53 to 59, printed record.

X.

The said case in the said Circuit Court of the United States for the Southern District of Ohio, Eastern District of Ohio, Eastern Division, was heard before and decided by the Honorable Albert C. Thompson, District Judge of the United States Court for the District of Ohio, upon the amended bill of complaint, the answer of The Great Southern Fire-Proof Hotel Company to the amended bill of complaint, the replication of complainant, and the agreed statement of fact and stipulations heretofore mentioned, and the said court did on the twentieth day of August, 1901, render a judgment therein, and did find that the respondents have a valid and subsisting lien upon said hotel company's premises from and after the sixteenth day of April, 1895, being the date on which the first item of material mentioned in said affidavit was furnished; that there is due to respondents by virtue of said

lien the sum of $11,410.02, with interest thereon from the twenty-eighth day of January, 1896, amounting in all at the date of such decree to $15,158.21; that said amount is due on account of said lien, and materials furnished in and about the construction of the building upon said premises hereinbefore described, and that no part of said amount has ever been paid and that the respondents are entitled to have said lien foreclosed, and did order and decree that unless the costs of said suit, and the amount found due the plaintiffs, with interest from the nineteenth day of June, 1901, shall be paid within ten days, the said Hotel Company's equity of redemption in said premises should be foreclosed, and an order should issue to the marshal of this district, directing him to appraise, advertise and sell said premises according to law.

To each and every of which said findings, orders and decrees of the court The Great Southern Fire-Proof Hotel Company excepted, and gave notice of and prayed an appeal from each and every of said findings, orders and decrees to the United States Circuit Court of Appeals for the Sixth Circuit, and gave notice for its desire to give a supersedeas bond to stay execution, order of sale and other proceedings on the decree herein rendered until the final determination of such appeal; and such appeal was granted and the court allowed an appeal to said The United States Circuit Court of Appeals for the Sixth Circuit, and fixed the amount of said appeal bond.

XI.

On the twentieth day of August, 1901, the petition of appeal of the said The Great Southern Fire-Proof Hotel Company, against the respondents, together with its

assignment of error, was filed in the clerk's office of said Circuit Court, and bond was given, and thereupon a certified transcript of the record of all proceedings of said Circuit Court in said case was filed in The United States Circuit Court of Appeals for the Sixth Circuit, and said case was entered and docketed as The Great Southern Fire-Proof Hotel Company, appellant, against Benjamin F. Jones, et al., appellees. No. 1034.

XII.

The assignment of errors filed on behalf of the said The Great Southern Fire-Proof Hotel Company to the judgment rendered in favor of Jones & Laughlins, Limited, omitting those which relate purely to questions of fact, and arise on the evidence, was as follows:

I. The United States Circuit Court for the Southern District of Ohio, Eastern Division, erred in overruling the demurrer interposed by the said The Great Southern Fire-Proof Hotel Company to the amended bill of complaint of said Jones & Laughlins, Limited.

II. The said court in holding and decreeing the mechanic's lien law of Ohio, especially each and every section thereof known as sections 3184 (91 O. L., page 135), 3185 (Bates Annotated Ohio Statutes), and 3185a (91 O. L., page 137), under which said sections the said The Jones & Laughlins, Limited, seek to enforce the purported lien set out in their amended bill of complaint, to be constitutional, and not in contravention and violation of section one (1) of the Bill of Rights of the Constitution of the State of Ohio, and of section one (1), Article fourteen (14), of the Constitution of the United States.

III. The said court erred in not following the decision

of the Supreme Court of the state of Ohio in the cases of Palmer & Crawford v. Tingle, and Young v. Lion Hardware Company, 55 O. S., 423, holding the said mechanic's lien law unconstitutional, to wit, Secs. 3184 (91 O. L., p. 135), 3185 (Bates' Annotated Ohio Statutes), and 3185a (91 O. L., p. 137), under which the said Jones & Laughlins, Limited, claimed and sought to enforce the purported lien set out in the amended bill of complaint, which said decision was rendered prior to the commencement of this action. * * *

VII. The said court erred in rendering a judgment and decree in said cause in favor of Jones & Laughlins, Limited, and against the said The Great Southern Fire-Proof Hotel Company.

VIII. The judgment and decree rendered by said court should have been rendered in favor of said The Great Southern Fire-Proof Hotel Company, and against The Jones & Laughlins, Limited.

The Great Southern Fire-Proof Hotel Company therefore prayed that the said decree and holdings of said Circuit Court of the United States, Southern District of Ohio, Eastern Division, be reversed and that said court may be directed to enter a decree dismissing the amended bill of complaint, and for all such other orders as the justice and equity of this cause may require.

XIII.

The said case came on to be heard on the appeal above mentioned before the said Circuit Court of Appeals on the seventh day of May, 1902, before the Honorable William R. Day, Horace H. Lurton and Henry F. Severens, and on the third day of June, 1902, the said

court rendered a judgment affirming the said judgment of the Circuit Court in favor of Jones & Laughlins, Limited.

XIV.

A certified copy of the entire record in the said case in the said Circuit Court of Appeals is furnished and filed herewith in conformity with Rule 37, of this Honorable Court relating to cases from Circuit of Appeals.

XV.

Your petitioner is advised and believes that the said judgment of the United States Circuit of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the Sixth Section of the act of Congress entitled, "An Act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act.

The judgment of the said Circuit Court of Appeals is erroneous in that said mechanic's lien law was held to be constitutional and said judgment was rendered in favor of the said Jones & Laughlins, Limited, whereas said law should have been held unconstitutional and said judgment should have been rendered in favor of your petitioner, for the following reasons, and on the following grounds, to wit:

(a) The mechanic's lien law of Ohio is unconstitu-

tional in that it denies to the owner of real estate the right of acquiring, possessing and protecting property, and the right of contract, in relation thereto, of making and enforcing contracts, of fixing and limiting the consideration therefor, and the manner and time of payment, and is not for the equal protection and benefit of the people, and therefore contravenes Sections 1 and 2 of the Bill of Rights (Art. 1, Constitution of Ohio), which sections are as follows:

"Sec. 1. All men are by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.

"Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc.

(b). It deprives the real estate owner of his property without due process of law, and of the equal protection of the laws, abridges the privilege of citizens of the United States as regards the right of contract, and is therefore unconstitutional, and in conflict with Sec. 1, Art. XIV., of the Constitution of the United States, which recites: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(c). The Circuit Court of Appeals should have followed the decision of the Supreme Court of Ohio, rendered before the said Jones & Laughlins, Limited, insti-

tuted any suit, and holding said law unconstitutional, because there was not presented to said Circuit Court any question as to negotiable paper, municipal bonds, general commercial law, or general jurisprudence, or any matter of interstate transportation and commerce, or any question other than the constitutionality of a law of the state of Ohio having no extra territorial effect.

(d). The said Circuit Court of Appeals should have followed the decision of the Supreme Court of Ohio holding said law unconstitutional for the reason that the Supreme Court of Ohio has at all times recognized and enforced the doctrine that the rights of material-men and sub-contractors are limited and defined by and dependent upon the contract between the owner and the original contractor, and are to be worked out through it (Copeland vs. Manton, 22 O. S., 398; Dunn vs. Rankin, 27 O. S., 132; Palmer & Crawford vs. Tingle, 9 O. C. C., 708; Stark vs. Slemmons, 54 O. S., 435; Palmer & Crawford vs. Tingle, and Young vs. Lyon Hardware Co., 55 O. S., 423; Hampson vs. The State, 9 O., 318, 319), which construction of the mechanic's lien law of Ohio obtained at the time the said Jones & Laughlins, Limited, made their contract with McClain, and at the time the said McClain contracted with your petitioner, nor has there at any time been a change made by the Supreme Court of Ohio in judicial construction as to the mechanic's lien law, or laws of said state; and during the time within which the said Jones & Laughlins, Limited, were furnishing labor and material to the said William J. McClain, to be used in said hotel and opera house building; the said case of Palmer & Crawford vs. Tingle, and Young vs. The Lyon Hardware Company, in which

the constitutionality of the said mechanic's lien law was called in question, was pending in the courts of Ohio, and the decision rendered therein by the Circuit Court of Putnam county, Ohio (9 O. C. C., 708), was made at the November Term of said court in 1895, and the said Jones & Laughlins, Limited, were apprised of the fact that the constitutionality of said law was questioned. The decision of the said Circuit Court of Appeals is in conflict with the decision of the Supreme Court of Ohio, and the doctrine relating to the mechanic's lien law which had uniformly been recognized by said Supreme Court in said state.

The importance and gravity of the questions raised and presented by the petitioner's demurrer to the bill and the aforesaid answers will be recognized when it is stated that under the provisions of said mechanic's lien law a lien is given to the material-men and sub-contractor without notice to the owner, at any time within four months from the completion of the improvement on the owner's real estate or the furnishing of labor or material, and in any amount not in excess of the original contract price between the owner and such principal contractor, regardless of the state of the account between the owner and such principal contractor, and thus the owner may be compelled to pay for his improvement in whole or in part a second time, and to a person with whom he sustains no contractural relations, although the owner may have acted in strict compliance with his contract, paid in advance, or as his improvement progressed; that such law has no application to any or all kinds of contracts but is limited in its operation to a special class of contracts, viz.: To those made by persons who labor or furnish materials

for the objects named in the act and thus discriminates in favor of a special class of citizens to the exclusion of all others; that such law places upon the owner of real estate a burden that is not borne by the owner of any other class of property; that such law denies to the owner of real estate the right to enjoy and possess property and contract in relation thereto as he may deem best; that such law denies the owner of real estate the right to contract with reference to his property other than a monied consideration, and deprived him of the right of fixing the amount, or medium of payment for improvements made on his property, in that he may be compelled to pay a second time, as aforesaid, and may be compelled to pay in money, although he may have contracted to pay in some other commodity; that such law makes the owner of real estate, by force of legislation security for the original contractor that such original contractor will perform his contract and thus defeats the owner in the enjoyment of his property; that such law divests the owner of his title without any act, tort or default on his part, and thus deprives him of the equal protection of the laws and of his property without due process of law; that such law tends to drive small and insolvent contractors out of business, and leaves the contract business in the hands of those who are rich enough to guarantee their contracts; that such law compels the owner of property to pay any claim or claims up to the full extent of twice the contract price, and gives him no recourse except an action by damages against the original contractor.

XVI.

Your petitioner is advised and believes that the judgment so rendered by the Circuit Court of Appeals is not in harmony with the decision announced by this Honorable Court in Gulf, Colorado & Sante Fe R. R. Co. v. Ellis, 165 U. S., 150, in that said mechanic's lien law deprives owners of their property without due process of law, and of the equal protection of the law, and makes a classification that is not based on any reasonable ground and makes a mere arbitrary selection of one class of citizens to the exclusion of all others.

This Honorable Court, in the decision announced in Gulf, Colorado & Sante Fe R. R. Co. v. Ellis, promulgated the same doctrine as announced in Coal Co. vs. Rosser, 53 O. S., 12; State vs. Ferris, 53 O. S., 314, and Young vs. The Lyon Hardware Company, 55 O. S., 423, and relied largely on the same authorities as were cited by the Supreme Court of Ohio to sustain its decision in said cases of Coal Co. vs. Rosser, and Young vs. The Lyon Hardware Co.

XVII.

Your petitioner thus respectfully submits that the question upon the legal and just construction and effect of the said mechanic's lien law of Ohio involved in and presented by the several demurrers and answers of your petitioner in said cases should be authoritatively and finally adjudged by this Honorable Court upon and after a full presentation to the court of the merits of said question on the part of the petitioner, and the said Jones & Laughlins, Limited, and further represents that this petition is not interposed for delay.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to The United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court on a day to be therein designated a full and complete transcript of the record and of all proceedings of said Circuit Court of Appeals in the said cases therein pending, entitled:

The Great Southern Fire-Proof Hotel Company, appellant, against Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Magdalaine F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, Jr., deceased, for William L. Jones, Mary J. Hillard and Thomas M. Jones, Jr., partners, doing business under the firm name and style of Jones & Laughlins, Limited, having their principle office and place of transacting business in the city of Pittsburg, in the state of Pennsylvania, appellees. No. 1034.

That said case may be reviewed and determined by this court as provided for in Section 6, of an act of Congress entitled, "An Act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem proper and in conformity with the said act, and that the said judgment of the Circuit Court of Appeals in the said

case, and every part thereof may be reversed by this Honorable Court, and your petitioner will ever pray, etc.

J. E. SATER,
HENRY GUMBLE,
Attorneys and Counsellors for Petitioner.

The State of Ohio, Franklin County, ss.:

J. E. Sater being first duly sworn, says that he is one of the attorneys and of counsel for The Great Southern Fire-Proof Hotel Company, the petitioner above named, and as such had personal charge for it of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, and in The United States Circuit Court of Appeals for the Sixth Circuit, and that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

J. E. SATER.

Sworn to before me and subscribed in my presence this —— day of December, A. D. 1902.

[SEAL.] L. F. SATER,
Notary Public in and for Franklin County, Ohio.

SUPREME COURT OF THE UNITED STATES.

The Great Southern Fire-Proof Hotel Company,
Petitioner,

vs.

Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM. Laughlin, Magdalaine F. Laughlin, Willis L. King, Henry A. Laughlin, James Laughlin, Jr., James B. Laughlin, Charles C. Briggs, Eliza L. Phillips, and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, Jr., deceased, for William L. Jones, Mary J. Hillard and Thomas M. Jones, Jr., partners, doing business under the firm name and style of Jones & Laughlins, Limited,

Respondents.

Motion for an Order that a Writ of Certiorari Issue.

The Great Southern Fire-Proof Hotel Company, the petitioner herein moves the court for an order that this court issue a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Judicial Circuit directing that court to certify to this court a copy of the records in that court of the case wherein said The Great Southern Fire-Proof Hotel Company are appellants, and the said Jones & Laughlins, Limited, are appellees; which case is found on the dockets of said court as case No. 1034, for the reasons and upon the grounds, to wit:

(1) The mechanic's lien law of Ohio, under which the said respondents asserted a lien is unconstitutional and void and in conflict with Secs. 1 and 2 of the Bill of Rights of the Constitution of said state.

(2) The Supreme Court of Ohio, prior to the commencement of any action by the respondents, had declared said law to be unconstitutional in the cases of Palmer & Crawford vs. Tingle, and Young v. The Lion Hardware Co., 55 O. S., 423.

(3) The Federal Court should follow the decision of the Supreme Court of Ohio.

(4) The said mechanic's lien law of Ohio is in violation of Sec. 1, Art. XIV, of the Constitution of the United States in that it interferes with the right of contract, deprives the petitioner of its property without due process of law, and of the equal protection of the law.

(5) The decision rendered by the Circuit Court of Appeals and the Circuit Court are in conflict with the settled doctrine in Ohio as promulgated by its legislature and announced by its courts regarding mechanic's liens and the rights of subcontractors under the mechanic's lien laws of said state.

(6) The respondents were apprised soon after entering into their contract with said McClain, and before any considerable material was furnished to him by them, that the constitutionality of the mechanic's lien law was denied and was contested in the courts of said state, and that its provisions were contrary to and in violation of the settled policy and doctrine of said state as promulgated by its legislature and announced by its courts.

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(7) The question involved is the same as when this cause was heretofore certified to this court, which question was not, for want of proper parties, decided on the final hearing in this court.

(8) For other reasons appearing in the petition for a writ of *certiorari* filed herein.

J. E. SATER,
HENRY GUMBLE,
Attorneys for Petitioner.

FILE COPY.

FILED
DEC 11 1902
JAMES H. McKENNEY,
Clerk.

THE SUPREME COURT OF THE UNITED STATES.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY.
Petitioner,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. JONES, JR., MARY F. LAUGHLIN, MARY McM. LAUGHLIN, MAGDELAINE F. LAUGHLIN, WILLIS L. KING, HENRY A. LAUGHLIN, JAMES LAUGHLIN, JR., JAMES B. LAUGHLIN, CHARLES C. BRIGGS, ELIZA L. PHILLIPS and BENJAMIN F. JONES and WILLIAM L. JONES, trustees under the last will and testament of THOMAS M. JONES, JR., deceased, for WILLIAM L. JONES, MARY J. HILLIARD and THOMAS M. JONES, JR., partners doing business under the firm name and style of JONES & LAUGHLINS, Limited;
Respondents.

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ON PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SIXTH CIRCUIT.

J. E. SATER,
HENRY GUMBLE,
Solicitors for Petitioner, The Great Southern Fire Proof Hotel Company.

THE SUPREME COURT OF THE UNITED STATES.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY.

Petitioner,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. JONES, JR., MARY F. LAUGHLIN, MARY McM. LAUGHLIN, MAGDELAINE F. LAUGHLIN, WILLIS L. KING, HENRY A. LAUGHLIN, JAMES LAUGHLIN, JR., JAMES B. LAUGHLIN, CHARLES C. BRIGGS, ELIZA L. PHILLIPS and BENJAMIN F. JONES and WILLIAM L. JONES, trustees under the last will and testament of THOMAS M. JONES, JR., deceased, for WILLIAM L. JONES, MARY J. HILLIARD and THOMAS M. JONES, JR., partners doing business under the firm name and style of JONES & LAUGHLINS, Limited;

Respondents.

ON PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

This case was before this Court heretofore, having been brought here by the same petitioner on its application for a writ of *certiorari*. The decision of the Court in that case is found The Great Southern Fire Proof Hotel Company v. Jones & Laughlins, Limited, 177 U. S., 449. The case was decided on a question of parties. The same conditions and reasons now exist for the granting of an application for a writ of *certiorari* as existed in the original case.

The Supreme Court of Ohio held the Mechanic's Lien Law of 1894 unconstitutional. After the rendering of that decision a suit was brought by Jones & Laughlins, Limited, in their partnership name, in the United States Circuit Court, Southern District of Ohio, Eastern Division, to enforce a mechanic's lien on the Hotel Company's property. The Circuit Court coincided with the Supreme Court of the State. 79 Fed. Rep. 477. On appeal the United States Circuit Court of Appeals of the Sixth Circuit reversed the Circuit Court, (86 Fed. Rep. 370), thus producing a conflict of decision as between the State and Federal Courts and as between the Federal Courts themselves. The case was then, on the Hotel Company's application, certified up to this Court by its direction. After it was remanded by this Court, such change was made as to parties and averments as to citizenship as gave jurisdiction to the Circuit Court and that Court, feeling that it was concluded by the decision of the Circuit Court of Appeals, on the constitutional question involved, followed that Court instead of the Supreme Court of Ohio. It also decided against the Hotel Company on the questions of fact involved. The Hotel Company then carried the case to the Circuit Court of Appeals, which affirmed the decision which had originally been rendered by it on the constitutional question, and also decided certain questions of fact.

The Hotel Company now asks that a writ of *certiorari* issue to the United States Circuit Court of Appeals of the Sixth Circuit, requiring it to certify the case again to this Court for final determination. There is also a diversity of decision between the State and the Federal Courts, on the constitutional question involved, which question is the one this Court is now asked to determine.

This Court has, on several cases, decided when, and for what reason, it may issue a writ of *certiorari*.

(1) It may be done in a case which is pending in the Court of Appeals.

(2) The case must belong to those classes of cases in which the decision of the Court of Appeals is declared a finality.

(3) It must be a case in which a question of "peculiar gravity," or of "general importance," or of "uniformity of decision" is involved.

In the case of Forsyth v. City of Hammond, 166 U. S. 506, 514, is found a statement of the rule announced by this Court. The opinion declares: "We reaffirm in this case the proposition heretofore announced, to-wit: that the power of this Court in *certiorari* extends to every case pending in the Circuit Court of Appeals, and may be exercised at any time during such pendency, provided, the case is one which, but for the provision of the statute, would be finally determined in that Court. And further, that while this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the ligitation in all the Courts of Appeal, it is a power which will be sparingly exercised, *and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding a conflict between two or more Courts of Appeal or between Courts of Appeal and the Courts of a State, * * * * demands such exercise.*"

Again in the American Construction Company v. Jacksonville, L. & K. W. Ry. Co., 148 U. S. 372, 383, the resolution of this Court was, that the power to issue the writ of *certiorari* would be exercised "only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

In Cunard Steamship Co. v. Fabre, 13 Sup. Ct. Rep. 1045, the writ was issued because one of the three Circuit Judges composing the Court of Appeals, dissented from the decree which reversed a decree of the District Judge.

In Forsyth v. Hammond, before cited, the controversy in the State Court was about the annexation of a few hundred acres of land to the city of Hammond, Indiana. The lower Court of that state, upon the verdict of a jury, decreed that the land should be annexed to the city of Hammond. Part of the land annexed belonged to Mrs. Forsyth. The city levied taxes to the amount of $3500.00 on her land. She filed a bill in equity in the Circuit Court of the United States for the District of Indiana, praying for an injunction restraining the collection of the taxes. The Court refused to award the injunction and dismissed her bill. She appealed to the United States Circuit Court of Appeals. That Court reversed the decision of the Circuit Court and remanded the case to that Court for further proceedings.

Before Mrs. Forsyth filed her bill in the United States Court she, and the owners of the rest of the annexed land, appealed from the judgment of the lower State Court to the Supreme Court of Indiana. The Court affirmed the decision of the lower Court, and this Court's decision was rendered before the decisions of either of the United States Courts was announced.

In both of these cases, in the one prosecuted in the United States, and in the one prosecuted in the State Courts, the sole issue was as to the validity of the annexation proceedings. The decision of the State Courts and of the United States Circuit

Court was that the proceedings were valid; the decision in the United States Court of Appeals was that they were invalid. There was a categorical contradiction between the decisions of the United States Circuit Court and the Supreme Court of Indiana, on the one side, and the decision of the United States Circuit Court of Appeals on the other side.

The pertinency of a quotation from the opinion in Forsyth v. Hammond, *supra*, page 515, disclosing the reasons for issuing the writ of *certiorari*, is obvious. Justice Brewer said:

> "Among the considerations thus suggested are those which indicate why, in this case, the Court properly exercised its power and issued the writ of *certiorari*. There was a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit, and the Supreme Court of Indiana. The latter Court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and therefore that that territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals, by its decision in this case had declared that such annexation proceedings were invalid, and that the property of this petitioner was not within the city limits. * * * All the unfortunate possibilities of conflict and collision which might arise from those adverse decisions were suggested when this application for *certiorari* was made, and although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The parallel between this case and the case at bar is perfect. There is no distinction whatever between the relevant master facts of the two cases.

In the case at bar the decision of the Supreme Court of Ohio was that the Mechanic's Lien Law referred to in the petitioner's

petition, was unconstitutional; and the decision of the United States Circuit Court was exactly in accord with that decision. The decision of the United States Circuit Court of Appeals was in positive conflict with those decisions. The decision of the Supreme Court of the State was rendered before the decisions of either of the United States Courts was rendered.

The only distinction between the two cases is, that in the case at bar the plaintiffs and the cross-petitioner were not parties to the case in which the Supreme Court of the State pronounced the Mechanic's Lien Law unconstitutional. But that distinction does not affect the parallel between them on principle and reason.

It is respectfully submitted, borrowing from the opinion of Justice Brewer, that the "unfortunate possibilities of conflict and collision which might arise from these adverse decisions," are enough to entitle this petitioner to have the case removed to this Court for examination, and are a sufficient reason why this Court should issue a writ of *certiorari* in this case..

It will probably be claimed that the matter involved in these suits is exclusively one of private interest. But that is not the true interpretation of these cases. The fact that there is a conflict between the decision of the Supreme Court of the State of Ohio, and the decision of the United States Circuit Court, on the one side, and the decision of the Circuit Court of Appeals, on the other side, renders the matter, involved one of public interest. The fact that there are only a few cases now pending in which this collision of decisions has occured, does not prove that there may not be oth r cases in which the same conflict may arise. It is possible that there yet may be other cases. This Court has a right, probably it is its duty, to consider this possibility.

The conflict which exists between these decisions, as shown by the record, makes the question involved one of gravity and importance — just such a question as has heretofore persuaded, and ought now to persuade, this Court to issue a writ of *certiorari*.

In Forsyth v. The City of Hammond, which we have cited, there was just as much reason for the contention that the matter involved was only of private interest, as there is in these cases. The Court said that by the decision of the Circuit Court of Appeals there "would be a tract of a few hundred acres of land within the exterior boundaries of the City of Hammond * * * withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits." On the other hand, the Court said, the Supreme Court of Indiana had declared that this tract of land *was* within the city's jurisdiction and territorial limits. Now, nobody was interested in this matter except the owner of the tract of land, on the one side, and the city of Hammond, a municipal corporation, on the other side.

The controversy did not involve the whole state of Indiana; it did not involve the whole population of the state of Indiana. It did not even involve the whole population of one county.

We again insist that the necessity of avoiding a conflict between the Circuit Court of Appeals, and the Supreme Court of the State, is a matter of public interest, and not of private interest; and that this is an answer to any criticism that may be made that these causes only involve a matter of private interest.

We assume that a discussion of the merits of the controversy in the case and of the decision of the Circuit Court of Appeals would not be relevant to the brief on this application for a writ

of *certiorari*, and we have therefore refrained from a discussion of these matters.

Respectfully submitted,

J. E. SATER,

HENRY GUMBLE,

Solicitors for Petitioner, The Great Southern Fire Proof Hotel Company.

Office Supreme Court U.S.
FILED
FEB 29 1904
JAMES H. McKENNEY,
Clerk

(18,745)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 165.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY,

PETITIONER,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS AND BENJAMIN F. JONES, JR., ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF ON BEHALF OF PETITIONER.

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BRIEF ON BEHALF OF PETITIONER.

STATEMENT.

I.

Your petitioner is a corporation duly incorporated under the laws of the State of Ohio, and now is, and has ever been, since the date of its incorporation, a citizen of said state and of no other, having its residence and principal place of business in the city of Columbus in said state; and the respondents (appellees below), Benjamin

F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary E. Laughlin, Mary McM. Laughlin, Magdaline Laughlin, Willis L. King, Henry A. Laughlin, Charles C. Briggs, Eliza L. Phillips and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary T. Hilliard and Thomas M. Jones, Jr., are members of a limited partnership association, doing business under the firm name and style of Jones & Laughlins, Limited (the respondents being hereinafter designated for convenience as Jones & Laughlins, Limited), which association was organized under the act of the General Assembly of Pennsylvania, approved June 23, 1874, entitled, "An act authorizing the formation of a partnership association in which the capital subscribed shall alone be responsible for the debt of the association, except under certain circumstances," each and all of which members of said association have their residence and place of business in the city of Pittsburg, in the state of Pennsylvania, and said limited partnership or association, and the members thereof, and each of them are and for many years past have been, citizens of said state, and of no other, residing in the city of Pittsburg and in the state of Pennsylvania.

II.

Your petitioner, on the tenth day of October, 1894, made and entered into a contract in writing with one William J. McClain, who in consideration of the sum of three hundred and forty-five thousand dollars ($345,000), agreed to do and perform all the necessary work and labor, and provide and furnish all proper and necessary materials, machinery, apparatus and tools for, and would construct and complete and made tenantable for your petitioner, a fire-proof hotel and opera house building, and thereupon the said William J. McClain did forthwith proceed towards the construction of said improvment on your petitioner's real estate in the city of Columbus, Franklin county, Ohio, known as In-Lots Nos. three hundred and fifty-two (352), three hundred and fifty-three (353), and three hundred and fifty-four (354), in said city.

III.

On or about the thirteenth day of December, 1894, the said Jones & Laughlins, Limited, made and entered into a contract in writing with the said William J. McClain, the principal contractor with your

petitioner, for the erection and construction of the aforesaid fire-proof hotel and opera house buildings, wherein it was provided that the said Jones & Laughlins, Limited, should furnish the said William J. McClain nine hundred (900) tons of structural steel for the said fire-proof hotel and opera house building, said structural steel to be furnished for the sum of thirty-two thousand five hundred and eight dollars ($32,508.00), F. O. B. cars, Columbus, Ohio, and further provided that if more than the nine hundred tons named in said contract be required, that the said Jones & Laughlins, Limited, would furnish the same at the rate of $1.81 per hundred pounds to be delivered in said city, or if a less amount be required than the said nine hundred tons, that the said Jones & Laughlins, Limited, would allow a reduction from the contract price at the rate of $1.81 a hundred pounds for the difference between the amount shipped and the nine hundred tons above mentioned. Said Jones & Laughlins, Limited, were to commence shipping said steel at once, and should complete the delivery thereof before August 1, 1895. The terms of payment for said steel was cash to be paid on the fifth day of each month following shipment (page 9, printed record, Exhibit A).

IV.

In accordance with the terms of said written contract between the said Jones & Laughlins, Limited, and the said William J. McClain, the said Jones & Laughlins, Limited, claimed to have furnished to the said McClain structural steel for said building alleged to be of the value of forty-three thousand two hundred and ninety-six and 74-100 dollars ($43,296.74), which structural steel was used by the said William J. McClain in and about the construction and erection of said fire-proof hotel and opera house building, and payments were made by the said William J. McClain to the said Jones & Laughlins, Limited, on account of the structural steel so claimed to have been furnished in the sum of thirty-one thousand eight hundred eighty-six and 72-100 dollars ($31,886.72), leaving a balance as claimed by the said Jones & Laughlins, Limited, due to them from the said McClain, of eleven thousand four hundred and ten and 2-100 dollars ($11,410.02).

V.

On the twenty-first day of April, 1896, at 4:50 o'clock p. m., within four months after having furnished the last structural steel

to the said William J. McClain, the said Jones & Laughlins, Limited, for the purpose of obtaining a mechanic's lien on the real estate, hotel building and opera house hereinbefore mentioned, and owned by your petitioner, duly filed with the Recorder of Franklin county, Ohio, an affidavit purporting to contain an itemized statement of the amount and value of the merchandise claimed to have been furnished by them under their contract with the said McClain, with the credits thereon, and a copy of the said written contract between them and the said McClain, and also a description of the aforesaid premises, and caused said affidavit to be recorded in book No. 9, pages 99, 100 and 101 of the Records of Liens of said Franklin county, Ohio, in which said affidavit the said Jones & Laughlins, Limited, claim that there was due them from the said McClain on account of structural steel furnished by them to him, the said sum of eleven thousand four hundred ten and 2-100 dollars ($11,410.02) with interest from January 28, 1896, and that they have a mechanic's lien on the aforesaid premises of petitioner for said amount.

VI.

Your petitioner further says that at the time of the making of the contract between your petitioner and the said McClain, as principal contractor, for the erection and construction of said fire-proof hotel and opera house building, and also at the time of the filing by the said Jones & Laughlins, Limited, of their aforesaid affidavit to procure a mechanic's lien on the aforesaid premises in said recorder's office and at all intervening times, the mechanic's lien law of Ohio was embodied in Section 3184 of the Revised Statutes of Ohio (91 Ohio Law, p. 135), Section 3185, Revised Statutes of Ohio (Giaque, Bates, Smith and Benedict edition) and Section 3185a, Revised Statutes of Ohio (91 Ohio Laws, p. 137), which said sections are as follows, to-wit:

> "Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well or any other well, or performs labor of any kind whatsoever, in altering, repairing, constructing any

oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof, or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory, or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, lease-hold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

"Sec. 3185. Such person, in order to obtain such lien, shall, within four months of the time from performing such labor or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder and a description of the land on which the gas well, oil well or other wells are situated, or the land on which the house, mill, manufactory, or other buildings or appurtenances, fixture, bridge or other structure may stand, or to which it may be removed, and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof, and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

Sec. 3185a. In all cases where the labor, machinery or material referred to in Sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contrator

for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding sub-contractors, material-men or laborers, fix an unreasonably low price in the original contract for any work or material for which a lien is given under section 3184, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such sub-contractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

VII.

On the ninth day of January, 1897, the said Jones & Laughlins, Limited, in their partnership name and not as individuals, filed their bill of complaint in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, in the Sixth Judicial Circuit, against the said Great Southern Fireproof Hotel Company and others to enforce its alleged mechanic's lien on the said real estate of the said hotel company, alleging among other things the execution of their contract with the said McClain; the furnishing of structural steel to him for said building; the sum still due them; the insolvency of the said McClain; the filing of their affidavit with the recorder of said county, to procure a mechanic's lien and praying that their alleged claim against the said McClain be declared a valid and subsisting lien on the premises of the said hotel company; that the liens on said property be marshaled, and the said premises sold and their claim satisfied out of the proceeds of such sale, and for all further proper relief.

Thereafter the solicitors of said hotel company on its behalf, filed a demurrer to said bill of complaint, on the ground that said bill did not make or state such a cause as entitled said partnership to recovery or relief sought and prayed for therein.

On the third of May, 1897, the Honorable George R. Sage, district judge of said court, found said demurrer well taken, and did allow and sustain the same, and the complainants, not desiring to amend their respective pleadings, the same were dismissed at their costs. The decision so rendered is found in the 79 Fed. Rep., 477.

Thereafter the said Jones & Laughlins, Limited, prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and on the sixteenth day of April, 1898, the said last named

court rendered a judgment reversing the judgment of the said Circuit Court for the Southern District of Ohio, Eastern Division, and remanded said cause to said last named court with directions to overrule said demurrer and require said hotel company to answer. The decision of the said Circuit Court of Appeals is reported in 86 Fed. Rep., p. 370.

Thereupon the hotel company filed its petition and motion in this honorable court, praying that a writ of certiorari be issued and directed to the said United States Circuit Court of Appeals in the case appealed thereto by the said Jones & Laughlins, Limited, against the said hotel company, and that said cause he reviewed and determined by this court, and for a reversal of the judgment of the said Circuit Court of Appeals in said cause and for all proper relief.

Thereupon said cause was certified to this court, and on the ninth day of April, 1900, the judgment of the said Circuit Court of Appeals and the said Circuit Court were reversed, and the said cause was remanded to said Circuit Court with direction that the said Jones & Laughlins, Limited, should be permitted to proceed to a final hearing providing they were able to amend their pleadings upon the subject of citizenship of the parties so as to come within the rule announced by this honorable court. The decision so rendered by this honorable court is reported in the 177 U. S., 449.

VIII.

On the twenty-first day of June, 1900, the said Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM, Laughlin, Willis L. King, Henry A. Laughlin, Charles C. Briggs, Eliza L. Phillips, Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hilliard and Thomas M. Jones, partners, doing business under the firm name and style of Jones & Laughlins, Limited, as individuals, filed their amended bill of complaint in the Circuit Court of the United States for the Eastern Division and the Southern District of Ohio, in the Sixth Judicial Circuit against the Great Southern Fireproof Hotel Company and certain others who claim liens on said premises, which amended bill recites that each and every of said respondents is a citizen and resident of the state of Pennsylvania, and otherwise con-

tains the same averments and prays the same relief as the original bill of complaint mentioned in paragraph VII, supra.

The solicitors of the said hotel company, on the seventeenth day of July, 1900, filed a demurrer to said amended bill of complaint for the same reason, and on the same ground and in the same form as were set forth and as appeared in the demurrer filed by said hotel company to the original bill filed by Jones & Laughlins, in their partnership name, and as recited in paragraph VII, supra. The Circuit Court, feeling itself bound by the decision of the Circuit Court of Appeals, overruled said demurrer, to which ruling your petitioner excepted.

IX.

The Great Southern Fire-Proof Hotel Company, believing the liens asserted on account of the unconstitutionality of the Ohio mechanic's lien law, is invalid, filed an answer to the amended bill and admitted the filing with the recorder of Franklin county, Ohio, of what purports to be an affidavit to obtain a mechanic's lien, and averred that the affidavit mentioned in said amended bill was filed and their alleged mechanics' lien upon the Great Southern Fire-Proof Hotel Company's said real estate was claimed pursuant to and under the right which was conferred by Sec. 3184 of the Rev. Stat. of Ohio (91 O. L., 135), Sec. 3185 R. S. of Ohio (Giaque's, Bates', or Smith & Benedict's Edition), and Sec 3185a R. S. of Ohio (91 O. L., 135), which statutes are, so far as they attempt to give a lien for materials or labor obtained by the contractor from a sub-contractor, material-man or laborer, unconstitutional and void in that they violate the inalienable right of enjoying liberty and acquiring property granted by Sec. 1 of the Bill of Rights of the Constitution of the State of Ohio; that on December 8, 1896, the Supreme Court of the state of Ohio, being the highest court of the state, determined and adjudged that said statutes, so far as they give a lien on the property of the owner to sub-contractors, laborers and those who furnish machinery, material or tile to the contractor, were unconstitutional and void, because they contravene and violate the provisions of said first section of said Bill of Rights of the Constitution of Ohio, in the cases of Palmer & Crawford vs. Tingle, and Young vs. Liom Hardware Company, 55 O. S. Rep., 423.

That said decision was rendered in cases which involved alleged

rights under state statutes and that it determined the validity of the state statutes under the constitution of the state of Ohio, and that the United States Courts should follow the decision of the Supreme Court of Ohio.

The said Great Southern Fire-Proof Hotel Company further averred that it seeks against the attempts on the part of the complainants to enforce against it the said statutes of Ohio, because the operation of said statutes, if permitted, would take from said company its property without due process of law, and deny to it the equal protection of the law, in contravention and violation of the provisions of the Constitution of the United States, and are especially contrary to and in violation of Sec. 1 of Art. XIV of the amendments to the Constitution of the United States and prayed the court to decree that the aforesaid sections of the Revised Statutes of Ohio are unconstituional and void, for a dismissal without costs and other proper relief.

The complainants filed their replication to such answer, and thereafter the respondents (complainants below) and The Great Southern Fire-Proof Hotel Company entered into an agreed statement of facts or stipulation which fully appears on pages 53 to 59, printed record, top page 31 to 36.

X.

The said case in the said Circuit Court of the United States for the Southern District of Ohio, Eastern Division, was heard before and decided by the Honorable Albert C. Thompson, district judge of the United States Court for the District of Ohio, upon the amended bill of complaint, the answer of the Great Southern Fire-Proof Hotel Company to the amended bill of complaint, the replication of complainant and the agreed statement of fact and stipulations heretofore mentioned, and the said court did on the twentieth day of August, 1901, render a judgment therein, and did find that the respondents have a valid and subsisting lien upon said hotel company's premises from and after the sixteenth day of April, 1895, being the date on which the first item of material mentioned in said affidavit was furnished; that there is due to respondents by virtue of said lien the sum of $11,410.02, with interest thereon from the twenty-eighth day of January, 1896, amounting in all at the date of such decree to $15,158.21; that said amount is due on account of

said lien, and materials furnished in and about the construction of the building upon said premises hereinbefore described, and that no part of said amount has ever been paid, and that the respondents are entitled to have said lien foreclosed, and did order and decree that unless the costs of said suit, and the amount found due the plaintiffs with interest from the nineteenth day of June, 1901, shall be paid within ten days, the said hotel company's equity of redemption in said premises should be foreclosed, and an order should issue to the marshal of this district, directing him to appraise, advertise and sell said premises according to law.

To each and every of which said findings, orders and decrees of the court The Great Southern Fire-Proof Hotel Company excepted, and gave notice of and prayed an appeal from each and every of said findings, orders and decrees to the United States Circuit Court of Appeals for the Sixth Circuit, and gave notice for its desire to give a supersedeas bond to stay execution, order of sale and other proceedings on the decree herein rendered until the final determination of such appeal; and such appeal was granted and the court allowed an appeal to said The United States Circuit Court of Appeals for the Sixth Circuit, and fixed the amount of said appeal bond.

XI.

On the twentieth day of August, 1901, the petition of appeal of the said Great Southern Fire-Proof Hotel Company, against the respondents, together with its assignment of error, was filed in the clerk's office of said Circuit Court, and bond was given, and thereupon a certified transcript of the record of all proceedings of said Circuit Court in said case was filed in the United States Circuit Court of Appeals for the Sixth Circuit, and said case was entered and docketed as The Great Southern Fire-Proof Hotel Company, appellant, against Benjamin F. Jones et al., appellees. No. 1034.

XII.

The assignment of errors filed on behalf of the said The Great Southern Fire-Proof Hotel Company to the judgment rendered in favor of Jones & Laughlins, Limited, omitting those which relate purely to questions of fact, and arise on the evidence, was as follows:

1. The United States Circuit Court for the Southern District of

Ohio, Eastern Division, erred in overruling the demurrer interposed by the said The Great Southern Fire-Proof Hotel Company to the amended bill of complaint of said Jones & Laughlins, Limited.

2. The said court in holding and decreeing the mechanic's lien law of Ohio, especially each and every section thereof known as sections 3184 (91 O. L., p. 135), 3185 (Bates' Annotated Ohio Statutes), and 3185a (91 O. L., p. 137), under which said sections the said The Jones & Laughlins, Limited, seek to enforce the purported lien set out in their amended bill of complaint, to be constitutional, and not in contravention and violation of section one (1) of the Bill of Rights of the Constitution of the State of Ohio, and of section one (1), article fourteen (14), of the Constitution of the United States.

3. The said court erred in not following the decision of the Supreme Court of the state of Ohio in the cases of Palmer & Crawford vs. Tingle, and Young vs. Lion Hardware Company, 55 O. S., 423, holding the said mechanic's lien law unconstitutional, to wit, Secs. 3184 (91 O. L., p. 135), 3185 (Bates' Annotated Ohio Statutes), and 3185a (91 O. L., p. 137), under which the said Jones & Laughlins, Limited, claimed and sought to enforce the purported lien set out in the amended bill of complaint, which said decision was rendered prior to the commencement of this action. * * *

7. The said court erred in rendering a judgment and decree in said cause in favor of Jones & Laughlins, Limited, and against the said Great Southern Fire-Proof Hotel Company.

8. The judgment and decree rendered by said court should have been rendered in favor of said The Great Southern Fire-Proof Hotel Company, and against The Jones & Laughlins, Limited.

The Great Southern Fire-Proof Hotel Company therefore prayed that the said decree and holdings of said Circuit Court of the United States, Southern District of Ohio, Eastern Division, be reversed, and that said court be directed to enter a decree dismissing the amended bill of complaint, and for such other orders as the justice and equity of this cause may require.

XIII.

The said case came on to be heard on the appeal above mentioned before the said Circuit Court of Appeals on the seventh day of May, 1902, before the Honorable William R. Day, Horace H. Lurton

and Henry F. Severns, and on the third day of June, 1902, the said court rendered a judgment affirming the said judgment of the Circuit Court in favor of Jones & Laughlins, Limited.

ARGUMENT.

Your petitioner claims that the judgment of the said Circuit Court of Appeals is erroneous in that said mechanic's law was held to be constitutional and said judgment was rendered in favor of the said Jones & Laughlins, Limited, whereas said law should have been held unconstitutional and said judgment should have been rendered in favor of your petitioner, for the following reasons and on the following grounds, to wit:

I.

The mechanic's lien law of Ohio of 1894 is unconstitutional because:

a. It denies to the owner of real estate the right of acquiring, possessing and protecting property, and the right of contract in relation thereto, of making and enforcing contracts, of fixing and limiting the consideration therefor, and the manner and time of payment, and is not for the equal protection and benefit of the people, and therefore contravenes Sections 1 and 2 of the Bill of Rights (Art. 1, Constitution of Ohio), which sections are as follows:

> "Sec. 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."
>
> "Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc.

b. It deprives the real estate owner of his property without due process of law, and of the equal protection of the laws, abridges the privileges of citizens of the United States as regards the rights of contract and is therefore unconstitutional and in conflict with Sec. 1, Art. XIV, of the Constitution of the United States which recites, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

II.

a. The Circuit Court of Appeals should have followed the decision of the Supreme Court of Ohio (Palmer vs. Tingle, 55 O. S., 423), rendered before the said Jones & Laughlins, Limited, instituted any suit, and holding said law unconstitutional, because there was not presented to said Circuit Court any question as to negotiable paper, municipal bonds, general commercial law, or general jurisprudence, or any matter of interstate transportation and commerce, or any question other than the constitutionality of a law of the state of Ohio having no extra territorial effect.

b. The said Circuit Court of Appeals should have followed the decision of the Supreme Court of Ohio holding the law unconstitutional for the reason that the Supreme Court of Ohio has at all times recognized and enforced the doctrine that the rights of material-men and sub-contractors are limited and defined by and dependent upon the contract between the owner and the original contractor, and are to be worked out through it, which construction of the mechanic's lien law of Ohio obtained at the time the said Jones & Laughlins, Limited, made their contract with McClain, and at the time the said McClain contracted with your petitioner, nor has there at any time been a change made by the Supreme Court of Ohio in judicial construction as to the mechanic's lien law, or laws of said state; and during the time within which the said Jones & Laughlins, Limited, were furnishing labor and material to the said William J. McClain, to be used in said hotel and opera house building; the said case of Palmer & Crawford vs. Tingle, and Young vs. The Lyon Hardware Company, in which the constitutionality of the said mechanic's lien law was called in question, was pending in the courts of Ohio, and the decision rendered therein by the Circuit Court of Putnam county, Ohio, (9 O. C. C., 708), was made at the November Term of said court in 1895, and the said Jones & Laughlins, Limited, were apprised of the fact that the constitutionality of said law was questioned. The decision of the said Circuit Court of Appeals is in conflict with the decision of the Supreme Court of Ohio, and the doctrine relating to the mechanic's lien law which had uniformly been recognized by said Supreme Court in said state.

The importance and gravity of the questions raised and presented by the petitioner's demurrer to the bill and its aforesaid answer will be recognized when it is stated that under the provisions of said

mechanic's lien law there is given to the material-men and sub-contractor without notice to the owner, at any time within four months from the completion of the improvement on the owner's real estate for the furnishing of labor or material, and in any amount not in excess of the original contract price between the owner and such principal contractor, regardless of the state of the account between the owner and such principal contractor, a lien against such real estate, and thus the owner may be compelled to pay for his improvement in whole or in part a second time, and to a person with whom he sustains no contractural relations, although the owner may have acted in strict compliance with his contract, paid in advance or as his improvement progressed; that such law has no application to any or all kinds of contracts but is limited in its operation to a special class of contracts, viz.: To those made by persons who labor or furnish materials for the objects named in the act and thus discriminate in favor of a special class of citizens to the exclusion of all others; that such law places upon the owner of real estate a burden that is not borne by the owner of any other class of property; that such law denies to the owner of real estate the right to enjoy and possess property and contract in relation thereto as he may deem best; that such law denies the owner of real estate the right to contract with reference to his property other than a monied consideration, and deprives him of the right of fixing the amount, or medium of payment for improvements made on his property, in that he may be compelled to pay a second time, as aforesaid, and may be compelled to pay in money, although he may have contracted to pay in some other commodity; that such law makes the owner of real estate, by force of legislation, security for the original contractor that such original contractor will perform his contract and thus defeats the owner of the enjoyment of his property; that such law divests the owner of his title without any act, tort or default on his part, and thus deprives him of the equal protection of the laws and of his property without due process of law; that such law tends to drive small and insolvent contractors out of business, and leaves the contract business in the hands of those who are rich enough to guarantee their contracts; that such law compels the owner of property to pay any claim or claims up to the full extent of twice the contract price, and gives him no recourse except an action by damages against the original contractor.

The Mechanic's Lien Law of 1894 is Unconstitutional.

The act of 1894, being the one under which the lien claimants have proceeded, runs counter to all former Ohio legislation on the subject. Sec. 3184 specifies the property on which a mechanic's lien may be taken. Sec. 3185 fixes the time within which the lien may be taken, designates the steps required to perfect a lien and the period of the lien's continuance. The lien is limited by Sec. 3185a to the actual value of labor, material or machinery furnished. In the absence of fraud or collusion between the owner and the original contractor, the aggregate amount of liens is not to exceed the contract price agreed upon between the owner and the original contractor for the labor performed and material and machinery furnished.

The law sought to give a direct and independent, and not a derivative, lien on the owner's property in favor of the subcontractor, laborer and material man. The filing of affidavits with the recorder of the county, if the law be valid, may give an absolute lien in favor of the claimant, up to the full amount of the owner's original contract price, regardless of the state of accounts between him and his original contractor. Although the owner may have paid in strict accordance and complied with every term of his contract, and may have paid the full contract price for his building, yet, under the Act of 1894, if the original contractor fails or neglects to pay his subcontractors or laborers, they may acquire liens on the owner's premises for their several claims for an amount not exceeding the original contract price of the building. Thus the owner, notwithstanding his having acted honestly and in good faith, may be compelled to pay twice for his building, and to persons with whom he has no privity of contract and who are strangers to him. The contract price ceases to be the measure of the cost of the owner's building, or of what lien holders may recover. The lien may be taken without notice to the owner at any time within four months from the date of the performance of the last item of labor or the furnishing of the last item of material or machinery.

The owner is made the guardian, as it were, of every laborer and sub-contractor having anything to do with the construction of his building, whoever such person may be and wherever he may be located. If the owner contract to pay and does actually in good faith pay for his building in advance, or by the transfer of land, or by the cancellation and surrender of a previously existing claim

held against the original contractor (and he may lawfully do any of these things), he must nevertheless, according to the statute pay again and in money to the sub-contractor to discharge his lien and to the full amount of his contract price. The owner, one of the parties to the contract for the erection of the building, by force of legislation, is made surety that the original contractor will perform his contract. While everybody else can be required to pay but once for that for which he contracts, the unfortunate owner of land who attempts to improve it by erecting a building thereon, must pay twice, if his head contractor defaults in his payments to his laborers and sub-contractors, and no contract can be made so iron-clad as to relieve the owner of this double liability.

The law discriminates against the owner of land who wishes to improve it, in that it attaches terms and conditions not affixed to any other contract which may be made under the laws of Ohio. It discriminates against the financially poor contractor and in favor of the rich, because prudent owners will not enter into a contract with men who are not in any event able to pay, and out of their own means if necessary. It discourages the erection of houses by the poor, who must limit their expenditures to a specified sum, because under the statute, no one commencing the erection of a building can know what will be its ultimate cost. It makes the original contractor, whose interests are opposed to those of his principal, the owner's agent, in violation of the primary principle of law that an agent cannot serve two masters, one of them being himself. It relieves laborers and sub-contractors in the making of contracts from that ordinary degree of care and caution exacted of all other persons, and places the whole burden on the owner. The laborer and sub-contractor may remain indifferent as to the financial responsibility of the original contractor, for they may rely wholly upon the building, whatever disposition the original contractor may make of the cost price thereof; but the owner is charged with a high degree of care and diligence, and is practically forced to see personally to the application of the money which he pays to the original contractor, in order to avoid a double liability.

The Ohio mechanic's lien law of 1894 perverts the meaning of the terms, "sub-contract" and "sub-contractor;" for, a "sub-contractor, as its very meaning indicates, is subordinate to the original contractor. A sub-contractor's lien, therefore, depends on the original con-

tract, and is, like the lien of the contractor himself, governed by its terms." (Boisot on Mechanic's Liens, Sec. 228.)

The laborers and sub-contractors are in fact the agents of the original contractor, and having assumed the performance of his principal's contract with the owner they ought to be required to perform it according to its expressed limitations, and for the amount therein named. They should not have the benefit of a builder's contract without accepting its burdens, or the conditions on which those benefits are conferred. In the construction of the building, the laborer and sub-contractor is charged with notice of the general character of the building, as to the kinds and quality of material of which it is to be constructed, of the times at which the same are to be furnished, of the requirements of the plans and specifications with reference to which the building is constructed and must observe them in their minutest detail, and should he depart from the designs, dimensions, materials, and the like, as expressed in the original contract, he does so at his own peril. As to these matters he is not permitted to say that he does not know or that he is not bound by the terms of the contract between the owner and the original contractor.

But the law of 1894, while requiring knowledge of all such provisions of the contract, does not charge the laborer or sub-contractor with notice of the price to be paid for the building or the manner and time of payment, or limit him thereto or bind him thereby.

Such an extraordinary law did not after its enactment long remain unchallenged. At the November Term of 1895 of the Circuit Court of Putnam county, Ohio, the law was declared unconstitutional in the case of Palmer & Crawford vs. Tingle, 9 O. C. C., Rep., 708. The suit grew out of a mechanic's lien based upon a contract dated April 23, 1894, the very month in which the law in question was enacted. The Circuit Court of Clark county, in the case of the Lion Hardware Co. v. Young and others, which suit was based on a contract made on the twenty-ninth day of June, 1894, sustained the constitutionality of the statute. Both cases drifted into the Supreme Court, and on the eighth day of December, 1896, the Supreme Court of Ohio held the law to be unconstitutional in both cases. (55 O. S., 423.) The validity of the law was, therefore, challenged as speedily as circumstances would admit.

Sections 1 and 2 of the Bill of Rights (Art. 1, Const. of Ohio) are as follows:

"Sec. 1. All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.

Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc.

In the case of Thaxter v. Williams, 14 Pick., 49, 53, it was claimed that one in the naked possession of land had power by contract to create a lien in favor of material men, etc., upon the land. But the Supreme Court of Massachusetts, by Wilde, J., denied this claim and held that "the legislature have not the constitutional power thus to enable one person to violate the right of property of another." How much less power has the legislature, as it has by this act attempted to do, to violate the right of property in another and deprive him of the same without his knowledge or consent, by virtue of a contract made by one not only not in possession of the property, but known to the material man, etc., to be only a contractor for the building without even an apparent title to the property. To uphold such a law would clearly deprive the owner of his property, not only without due process of law, but without any laches on his part or semblance of authority to contract for him.

"Constitutional liberty means not only the freedom of the citizen from servitude and restraint, but includes the right of every man to be free in the use of his powers and faculties, and to adopt such avocation or calling as he may choose, subject only to the restraints necessary for the common welfare. Rights of property preserved by all constitutions is right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following lawful pursuit. The property which each citizen has in his own labor is a common heritage, and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. Right to contract is both a liberty and a property right. If any person is denied the right to contract and acquire property in the manner in which he has hitherto enjoyed it under the law, and which others are still allowed by law to enjoy, he is deprived of both the constitutional right of liberty and property."

Bracewell vs. People, 147 Ill., 66.

In State vs. Goodwell (33 W. Va., 179), Judge Snyder, delivering the opinion of the court, said: "The court, in People vs. Gillson, says: "The term liberty, as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration; but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. 109 N. Y., 398; Field J., in Butcher's Union Co. vs. Crescent City, etc., Co., 111 U. S., 755; Association vs. Crescent City Co., 1 Abb. 398. The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment, both upon the just liberty and rights of the workman and his employer, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression. These principles have been fully recognized and announced in many decisions of the Supreme Court of the United States and other courts."

"The right of life, liberty and property are grouped together in the same sentence. They constitute a trinity of rights, and

each as opposed to any unlawful deprivation thereof is of equal constitutional importance. With each, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right effectual and valuable in its most extensive sense pass as incidents to the original grant. The rights thus guaranteed are something more than mere privilege of locomotion; the guaranty is the negative of arbitrary power in every form which results in deprivation of right. These terms, life, liberty and property, are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrest, right to buy and sell as others may—all our liberties, personal, civil, political—in short, all that makes life worth living; and of none of these rights can any one be deprived except by due process of law."

State vs. Julow, 129 Mo., 172.

Within the definition given by these authorities, and there are many others to the same effect, it seems to us that there can be no question as to the unconstitutionality of this Ohio mechanic's lien law. It certainly deprives the owner of property of his right to make such contracts as other men may make; and deprives him of the right to contract with whom he chooses, a privilege which is not denied to any other citizen of the United States. He cannot make such contracts as he pleases, for if he contracts to have his house built at a considerable reduction in price by his payment of the money in advance, he may be compelled to pay the full amount all over again at the suit of sub-contractors or material men. Nor can he make a contract with whom he chooses, for he can only contract with one who is perfectly responsible and able to give a sufficient bond; for otherwise he is liable to be called upon to pay twice for the same work.

The Supreme Court of Ohio found that the law in question was in contravention of the provisions of the bill of rights; that "liberty to acquire property by contract, can be restrained by the General Assembly only so far as such restraint is for the general welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the General Assembly in such case is not conclusive;" and that the Act

of 1894, "in so far as it gives a lien on the property of the owners to sub-contractors, laborers and those who furnish machinery, material or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner."

It was conceded in the opinion that exemption laws, although they in a slight degree limit the liberty of contract, laws against usury and laws in other like cases restraining the liberty of contract are valid because the court can see in such cases that such laws are for the general welfare of the whole people and do not, therefore, interfere with their equal protection and benefit, but the court could not see that a law which requires a corporation to pay its employes at least twice in every month (State v. Iron Co., 55 O. S., 442), or a law which limited the hours of service of those employed on public works (Cleveland v. Construction Co., 67 O. S., 197), or a law like that in question, which takes away from the owner of a building the liberty of contract that the seller of materials may collect their value from a man who never purchased them and who has already paid the person with whom he contracted for all that he has received, is for the general welfare. "There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract. An agent can have no interest adverse to his master, but this statute attempts to create an agent for the owner out of the contractor, who is opposed to him in every interest. It is an attempt to make the contractor serve two masters, himself and the owner. This cannot be done. For this we have the highest authority."

The reasoning of the court coincides with that of Palmer & Crawford v. Tingle, 9 O. C. C., 708. The decision of the Ohio courts is abundantly sustained on reason and authority. Overton on Liens, Sec. 553, after announcing that the sub-contractor will be bound by the terms of the contract between the contractor and the owner of the building, adds: "Any statute or rule which should in any way deliver him as a workman from the obligations as taken by his superior, would at once violate the constitutional provision against laws which would impair the obligation of contracts." In Stewart v. Wright, 52 Ia., 335, it was said: "If one should contract with a builder to

erect a house and agree to pay him in advance and comply with his contract by making the payments, we very much question whether it is within the power of the legislature to require that he shall be liable to pay for his building twice, by paying all claims of sub-contractors who may assert claims after the payments have been made."

A law similar to that of Ohio was enacted in Michigan and in The John Spry Lumber Co. v. Trust Co., 77 Mich., 199, the law was declared unconstitutional because "it strikes at the foundation of all property and land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required and his freedom from default is no defense. He may pay in full or in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he has never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter excepting as a fact which binds no one and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer."

Other cases to the same effect are Mellis v. Race, 78 Mich., 80; Snell v. Race, 78 Mich., 334; Waters v. Wolfe, 162 Pa. St., 153, 170; Meyer v. Berlandi, 39 Minn., 438, 432.

In the last named case it was stated: "As liens are an encumbrance upon the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent or by due process of law. The basis of the right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to sub-contractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract. O'Neil v. St. Olaf's School, 26 Minn , 329; Laird v. Moonan, 32 Minn., 358."

An interesting discussion of a law similar to that of Ohio is found in Selma Sash, Door and Blind Factory v. Stoddard, 116 Ala., 251. It was there said; "It is not denied, the legislature may establish proper rules of evidence, but not to the extent of depriving one of his property without due process of law; nor is it denied that the owner's contract is made under and subject to the provisions of the

existing lien law, provided these provisions do not infringe his constitutional rights. But, suppose the owner contract with another to erect a house, or to do any of the other things for which a lien is given under Section 2 of this Act, and he has paid, as required by Section 2½, and the work is not completed, and the contractor, who is still under obligations to complete the work, and is liable for not doing so, goes forward to complete it, with labor and materials of his own responsibility without the procurement of the owner, or his having in any way obligated himself for it, having performed his entire obligation under the laws to the contractor, sub-contractor and material men, can it be maintained on any principle of right guaranteed to us, that the owner shall be held liable without his own consent, for all that is done by the contractor in the completion of his contract? Is he required to notify sub-contractors and material men in writing not to come on his premises, and not to aid the contractor in performing his duty? How could he even hold his contractor liable for breach of his contract when the latter was able and willing, even, to perform it, if he should notify the sub-contractor, laborers and material men in writing not to perform such labor or furnish such material? The section goes too far. It over-reaches itself, in an effort to protect the sub-contractor and material man, at the expense of the owner, and gives them an advantage over him, which is not right or natural. While the owner should be just towards such parties, they ought to be just to him. The law should not constitute him their guardian, without their request, and hold him liable for things he never engaged to become responsible for by contract, express or implied, in any just or fair sense. * * * A sub-contractor or material man must take notice of the terms and character of the contract between the owner and the original contractor; and the legislature has no power to authorize a contractor to change the terms of his contract with the owner, and impose additional liabilities upon him, and liens upon his lands, by any agreement with other parties to which the owner was not a party, of which he has no notice, and there is no provision by which he can acquire such notice or information. The statute is clearly unconstitutional and void."

In Renton v. Conley, 49 Cal., 185, 187, a law similar to that of Ohio was involved. The pleadings were similar to those in this case in that the materials had been furnished to the con-

tractor and in that no express agency was averred. The agency relied on was the implied agency created by the statute. In that case, as in this, it was not alleged that any part of the contract price for the building remained unpaid from the owner to the contractor at the time of recording the notice of lien. It was claimed that the material man's lien was valid irrespective of the fact that the owner, when he first had actual or constructive notice thereof, may have paid to the contractor the full contract price when and as it became due under the contract. There was no provision in the lien limiting the lien to the amount which might be due from the owner to the original contractor under their contract, even though the materials were furnished at the instance of the contractor alone. The court held, however, that if the owner had made payments to the contractor in good faith under and in pursuance of the contract between them, before receiving notice, either actual or constructive, of the liens of material men and laborers, the building cannot be charged with liens exceeding the balance of the contract price remaining unpaid when notice of the lien was given.

The same doctrine is also found in McAlpine v. Duncan, 16 Cal., 127, and Bowen v. Aubrey, 22 Cal., 571.

Other cases bearing out the doctrine announced by the Supreme Court of Ohio, are Henry v. Rice, 18 Mo. App., 497, and Waters v. Wolfe, 162 Pa. St., 153. The latter case arose on a contract in which the contractor agreed that no lien should be filed against the owner's premises or on account of said contractor, and that no legal or lawful claim should be made against the contractor in any manner from any source whatever for work or materials furnished on the improvement. At the time the contract was made there was a statute in that state which required the written consent of the sub-contractor in order to bind him by a stipulation in the contract between the original contractor and the owner that no mechanic's lien should be filed. The Act was held to be unconstitutional in that it attempted to create a debt and give a lien therefor against the express provisions in the contract. The second section of the Pennsylvania Act also provided that the contractors shall be the agent of the owner in ordering work or materials and that any sub-contractor doing work or furnishing materials shall be entitled to a lien, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless

such stipulations should be assented to by said sub-contractor. This was likewise held to be unconstitutional, in that it attempted to frame a new contract, and substitute it for the one made by the parties. The law was held to impair the right of contract, and overthrow the well settled doctrine of agency.

The Supreme Court of Ohio held the mechanic's lien law of 1894 unconstitutional because it invaded the liberty and property rights of the owner, for the privilege of contracting is both a liberty and a property right. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. The right to make contracts is one of the attributes of property, and when an indivdual is deprived of such right he is deprived of his property within the meaning of the constitution.

Ritchie v. The People, 155 Ill., 98.
Frorer v. People, 141 Ill., 171.
State v. Loomis, 115 Mo., 307.
Matter of application of Jacobs, 98 N. Y., 98.

The right to contract affords the only way by which a person can rightfully acquire property by his own labor. "Of all of the rights of persons, it is the most essential to human happiness." Leep v. St. L. I. M. & S. Ry Co., 58 Ark., 407.

> "The right to contract granted a corporation by its charter includes the right to *fix the price at which labor for it will be performed, and the mode and time of payment.* Each is an essential element of the right to contract, and a restriction as to either as it is enjoyed by the community at large is an abridgement of the constitutional right of liberty and property."
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> Braceville Coal Co. v. People, 147 Ill., 66.

It follows also from the Ohio decisions that the Act of 1894 is obnoxious as class legislation, for it imposes upon the property owner a burden attaching to no one else. It is not uniform in its operation. The principle is the same as that announced in State v. Ferris, 53 O. S., 314, wherein a law imposing a direct inheritance tax was held invalid because it exempted from taxation the right to receive or succeed to estates not exceeding $20,000 in value, and taxed the sole right of receiving or succeeding to estates which exceeded that sum in value, and also taxed at a higher rate per centum the right to receive or succeed to estates of a larger value than to estates of a smaller value.

So in the Hocking Valley Coal Co. v. Rosser, 53 O. S., 12, a law was held unconstitutional which provided that if a person to whom wages were due, demanded his wages in writing, and they be not paid, within three days after such demand, and suit be brought therefor, if a recovery be had as claimed in the bill of particulars, the judgment should include not only the amount claimed, but an attorney's fee not in excess of $5.00 to be paid to plaintiff's attorney, and if an appead were taken from such judgment and the plaintiff recover in a higher court a like sum exclusive of interest, an additional fee not in excess of $15.00 should be assessed against the unfortunate defendant. The principle of these cases is fully recognized and endorsed in Gulf, Colorado & Sante Fe R. R. Co. v. Ellis, 165 U. S., 150, in which the very cases relied on by the Supreme Court of Ohio in the Rosser case, *supra*, and Palmer & Crawford v. Tingle, *supra*, were cited and approved.

The Supreme Court of Illinois, in Ritchie v. People, 155 Ill., 98, held an Act unconstitutional which prohibited the employment of females in any factory or workshop for more than eight hours a day, on the ground that it was partial and discriminating in its character, whether applying only to manufacturers of wearing apparel, or to manufacturers generally, and in the opinion it is said: "If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right."

In Braceville Coal Co. v. People, 147 Ill., 66, it was held that: "A law singling out persons, corporations or associations, engaged in any particular business, and depriving them of the right to contract as persons, corporations or associations, engaged in any other business, may lawfully do, is unconstitutional and void."

Other cases in line with the foregoing are Godcharles v. Wigeman, 113 Pa. St., 431, and State v. Goodwill, 33 W. Va., 179, in both of which cases laws were held to be unconstitutional which prohibited coal and iron men from paying their employes with orders payable in goods or anything but money, and providing that even if such orders were honored, they might still be treated as void and a recovery had by the employes as fully as if such orders had not been paid.

"It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitutional laws, that any one citizen should enjoy privileges and advantages which are denied to all others, under like circumstances; or that one should be subjected to losses, damages, suits or action from which all others under like circumstances are exempt."

Holden v. James, 11 Mass., 396.
S. & N. Ala. R. R. Co. v. Morris, 65 Ala., 194, 199.
State v. F. C. Coal Co., 33 W. Va., 188.
Eden v. People, 161 Ill., 296.
Ex parte Jentzsch, 112 Cal., 468.

The law, if sustained, would as held in Palmer & Crawford v. Tingle, 55 O. S., 423, operate to exclude the small and financially weak contractors from business. It would deprive such persons of liberty in its broad sense as understood in this country, to wit, the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his lievlihood in any lawful calling, and to pursue any lawful avocation.

People v. Gillson, 109 N. Y., 389.

In Butchers Union, &c. Co. v. Crescent City, &c., Co., 111th U. S., 755, Mr. JUSTICE FIELD, in interpreting the inalienable rights referred to in the Declaration of Independence, said: "Among these inalienable rights, as proclaimed in that great document is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or avocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and calling of life, the ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. It has been well said, 'The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper,

without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty of both the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the other from employing whom they think proper.' " State v. Goodwill, 33 W. Va., 179; State v. Peel Splint Coal Co., 36 W. Va., 856; Brannon on the Fourteenth Amendment, 110-112; Allgeyer v. Louisiana, 165 U. S., 578, 590.

It may be said that the law is not class legislation because it operates upon all within a class. But a law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all.

Ex parte Jentzsch, 112 Cal., 468.

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equity clause of the 14th Amendment and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and it is not a mere arbitray selection."

Gulf, Colo. & Sante Fe R. R. Co. v. Ellis, 165 U. S., 150.

"The inhibition of the amendment (Fourteenth) that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

Pembina Consolidated &c. Co. v. Pennsylvania, 125 U. S., 181, 188.

It may also be urged that the law is not class legislation in any greater degree than the laws regulating bankers, traders, married women, minors, and the like. Laws affecting bankers and traders, however, are for the benefit and protection of all the people, for the whole commerical and labor world depends upon the care, honesty and correct management of bankers. The laws relating to minors and married women are based on a different principle from the mechanic's lien law in question. Married women were at common law under many disabilities, which placed them in much the same category as minors, and for the protection of minors and married women and for the husbanding of their property, and for their proper susten-

ance, support and protection, special legislation was found necessary. The exemption in favor of the heads of families is for the protection of the home, and applies to every person that has a family. The exemption of a portion of the earnings of a laborer is likewise for the protection of the family and is beneficial to the whole people, because it is better that the laborer should be protected sufficiently than that he should become a charge upon the state or an object of charity. No such reasoning exists for the enactment of a mechanic's lien law like the one in question. Under the law which secured to the laborer and material man a derivative lien, and not a direct and independent lien as was given by the Ohio law of 1894, they may if they desire, know the very terms of the original contractor's lien, and contract with him or not, as they choose.

Their knowledge of the cost of building is almost invariably greater than that of the owner. The privilege accorded them of filing an affidavit with the owner before furnishing any labor or material reciting that they are about to furnish the same (and this has long been the law of Ohio), and thus stop the payment of money to the original contractor, affords them an ample remedy, unless they make an unwise contract, and at the same time the owner is enabled to protect himself.

The mechanic's lien law now in question deprives the owner of his property without due process of law.

This appears from many of the cases heretofore cited. "Due process of law" and "the law of the land" are synonymous, and used interchangably.

Cooley's Const. Lim. (3rd Ed.), Sec. 353;
Millett v. People, 117 Ill., 294.

Due process of law means "that every citizen shall hold his life, liberty, property and immunities under the protection of the *general* rules which govern society." Everything which may pass under the form of an enactment is not, therefore, to be considered as the law of the land.

Cooley's Const. Lim. (3rd Ed.), Sec. 353.

Such general public law must be founded on reason.

Harding v. People, 160 Ill., 439.

The privilege of contract being a liberty and a property right, no one can be deprived of it without due process of law.

Ritchie v. People, 150 Ill., 98.

> "Every one has a right to demand that he be governed by general rules, and special statutes which, without his consent, singles his case out as one to be regulated by a different law from that which is applied to all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free goverment."

Cooley's Const. Lim. (3rd Ed.), 391, 392.

The same author, Sec. 393, states that if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have the capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act will transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an indivdual or a class the right to the acquisition or enjoyment of property in such a manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness.

In this court which for so many years was honored by having as one of its members Justice Field, whose dissenting opinion in ex parte Newman, 9 Cal., 518, subsequently became the majority opinion in ex parte Andrews, 18 Cal., 678, and is now accepted as the law upon the question involved in those cases, we do not hesitate to claim that in the dissenting opinion of Cassiday, J., in the case, Mallory v. Abattoir Co., 80 Wis., 180, will be found the true reasoning and sound authority upon which this case should be decided, and as its value and force appear not in one, but in all parts thereof, we submit it in full, in the full expectation that the decision of the court which the learned judge awaited will vindicate the wisdom of his reasoning and the potency of his authorities.

CASSODAY, J. The question presented is whether the defendant, after having fully paid Nicholas Bros. the whole of the contract price, without any notice or any claim against them by the plaintiffs or any one else, is still bound to pay to the plaintiffs, as subcontractors, the

sum of $917.38 and interest. If such claim can be maintained, then upon the same principle the defendant would have been bound to pay such claim even had the contract required the defendant to pay in advance, and the amount had been so paid in full; or, even after such payment in advance, had Nicholas Bros. sublet the whole job, then the defendant would have been obliged to pay over again for all material and labor that went into the job, even though it greatly exceeded the contract price. If such claim can be maintained, then upon the same principle the legislature could make every purchaser of goods from a retail dealer, even for cash down, liable for any balance due thereon to the wholesale dealer. It is in effect conceded that no one can defend any such claim upon ethical grounds. The contention seems to be that the legislature had the power to disregard all ethical considerations, and make the defendant and every other land-owner absolutely liable for all material and labor going into any structure upon his land, regardless of whether he pays the contract price in advance, or subsequently and before notice of any claim in favor of any subcontractor, and that the legislature has done so by Ch. 333, Laws of 1889, which only requires notice to the owner or his agent "within sixty days after performing such work or labor or furnishing such materials."

I frankly concede that, if the enactment was within the power of the legislature, then the courts are bound to enforce it, regardless of their notions of its wisdow. It is, moreover, very obvious that the act did not impair the obligations of the defendant's contract, since the contract was made subsequent to the time when the act went into effect.

To my mind the act is repugnant to that provision of the Constitution of the United States which declares that "no state shall * * * deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Sec. 1, Art. XIV, Amendment.

That provision was ordained and established for the very purpose of taking away from every state and its legislature every one of the powers thus prohibited. Streubel vs. Mil. & Miss. R. Co., 12 Wis., 67, cited in the opinion of the majority of the court, was decided long before the constitutional provision was adopted, and of course has no bearing upon the binding force of that provision. The case of Munger vs. Lenroot, 32 Wis., 541, was decided subsequently

to the adoption of that provision, but neither the opinion of the court nor the dissenting opinion therein make any reference to it, and hence it must be assumed that it was not considered. The same is true in regard to Winslow vs. Urquhart, 39 Wis., 260, and other cases referred to in the majority opinion. These cases are entitled to be regarded as authority upon the question of construction therein determined and it seems to me they are not entitled to such weight as against the provision of the federal constitution quoted, which after all must be regarded as the supreme law of the land, anything in any state constitution or statute, or the decision of any state court, to the contrary notwithstanding. Art. VI, Const. of U. S. Besides, the question whether such legislation is repugnant to the constitutional provision quoted is one upon which the Supreme Court of the United States is the final arbitrator, and hence, until determined by that court, the question would seem to be open to the expression of opinion. That court has never passed upon the precise question here presented.

The act enables the contractor to limit his own duties, obligations, and liabilities by contract, and at the same time enables him, through the agency of a subcontractor, to bind the owner without limitation, for all materials and labor that go into the structure. The subcontractor is not even limited to the specifications contained in the original contract, for by the terms of the act he may compel the owner to pay for what he has never contracted for. It not only makes the owner, without his consent, responsible for the contractor's contracts with subcontractors, but also for his frauds. It authorizes the subcontractor to compel the owner to pay the contractor's debts after he has, without notice of any adverse claim, paid to the contractor the whole contract price to enable him to pay his own debts. It does not in terms prohibit the owner from paying in advance or paying without notice, but precludes him, as against a subcontractor, from the benefit of such payment. It authorizes the contractor, after the making of the contract, to do what the legislature could not then do; that is, to change the terms of the contract without the consent of the owner, and hence to impair its obligations.

Such legislation is a recent invention. It seems to belong to that class which Herbert Spencer had in mind when, according to a recent interview, he said: "Since I began to write, there has been a clear reaction against individual liberty. We are certainly tend-

ing toward state socialism, which will be a worse form of tyranny than that of any government now recognized in civilization." If we have no constitutional barriers against such legislation, then Mr. Spencer's opinion, that such reaction and tendency endanger the American states as well as the European, would seem to rest upon a solid basis, instead of being mere speculation, as might otherwise be supposed.

It seems to me that a man cannot reasonably be said to have due process of law, and equal protection of the laws, under an act which enables his contractor to bind him conclusively without his consent or knowledge and contrary to the express terms of their written contract, and merely permits him, when sued thereon, to answer to the effect that by the terms of the act he has become so bound and was unable to prevent it. On the contrary, before any conclusive statutory liability should be imposed upon any person, he should be guilty of some tort or give his consent, or be in default, or have such notice as would enable him to protect himself against gross injustice, otherwise the creation of such liability is an arbitrary and unjustifiable imposition.

By this provision of the constitution it was "undoubtedly intended", said Justices Field and Bradley, each speaking for the whole court, "not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoiliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights; that all persons would be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the preservation and redress of wrongs, and the enforcement of contracts; that no impediments should be imposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions."

Barbier vs. Connolly, 113 U. S., 31; Bell's Gap. R. Co. vs. Pennsylvania, 134 U. S., 238. "Clear and hostile discrimination against particular persons and classes, especially such as are of an unusual character unknown to the practice of our governments, might be obnoxious to the constitutional prohibition." 134 U. S., 237.

So it has been said by Justices Bradley and Matthews, each speaking for the whole court, that, "in judging what is due process of

law, respect must be had to the cause and object of the taking—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'" Davison vs. New Orleans, 96 U. S., 107; Kentucky Railroad Tax Cases, 115 U. S., 33. In Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418, the act of the legislature gave to the commission therein prescribed the final and exclusive authority to determine and fix what should be regarded as equal and reasonable rates of charges for the transportation of property, and the act was held to deprive the company of its property without due process of law, and to deprive it of the equal protection of the laws, and accordingly reversed the Supreme Court of Minnesota, holding to the contrary. State ex rel R. & W. Comm. vs. C. M. & P. R. Co., 38 Minn., 281. To the same effect is Minneapolis & E. R. Co. vs. Minnesota, 134 U. S., 467. Such imposition, through the agency of a public commission and fixed and public rates, upon any railway company entering into a contract for such transportation, was far less objectionable than to authorize a contractor, through the agency of a stranger and in secret, to impose such an arbitrary, unjust and absolute liability upon the land owner without his knowledge or consent or any certain means of ascertaining the fact until sixty days after the completion of the work or the furnishing of the material.

A statute similiar to the one in question was held void in Spry Lumber Co. vs. Sault Sav. Bank, Loan & Trust Co., 77 Mich., 199. In the opinion of the court in that case, by the late and learned Chief Justice Campbell, it is said: "It strikes at the foundation of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance or otherwise, for all he has contracted for. He may contract for a house built in a certain way and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can

make it plainer." In a recent case in Pennsylvania it has been held that a subcontractor is chargeable with notice of all the terms and stipulations of the contract between the owner and the principal contractor, and is bound thereby, since his only connection with such owner is through and by means of such contract. Schroeder vs. Galland, 134 Pa. St., 277. To authorize A., through the agency of a subcontractor, to impose an arbitrary, unjust and absolute liability upon B., without his default, and contrary to the express stipulations in the written agreement between them, and without any notice that will enable him to protect himself against such liabitity, and without his violating any statute or any law, or committing any tort or wrong, is, certainly, to deprive B. of his property or rights of property without due process of law, and to deprive him of the equal protection of the laws. King vs. Hayes, 80 Me., 206; Ulman vs. Mayor, 72 Md. 587; Garvin vs. Daussman, 114 Ind., 429; Oregon R. & N. Co. vs. Smalley, 1 Wash., 206.

It is true the opinion of the majority of the court is supported, not only by the decision of this court herein cited, but also of other state courts of high standing, the latest of which is by the Supreme Court of Tennessee, in a case not cited by counsel. Cole Mfg. Co. vs. Falls, 16 S. W. Rep. (Tenn.), 1045. But such cases either fail to meet the objection upon which this dissent is based, or meeting it, fail to give any satisfactory reason for excluding such statutes from the prohibitions mentioned. It may be that the Supreme Court of the United States will eventually sanction such legislation, but until they do so I am forced to withhold my assent:

The fact that the owner may refuse payment of a sub-contrator's lien until compelled to pay by judicial inquiry, does not relieve the law of its obnovious features, for the reason that the statute gives a a lien for the amount of the laborer's and subcontrator's claim without any contract between him and the owner, and without notice to the owner. The effect of a judicial inquiry could only be to require proof of the amount of the claim. The recovery against the property owner to the full value of the contract price does not depend upon whether he is in default, or has given his consent, or is guilty of tort or neglect, or has knowledge of the failure of the original contractor to pay his liabilities.

If the legislature has the right to make all contracting parties liabie under contracts beyond the amount of the contract price and re-

gardless of the same, such law to be constitutional must rest alike upon all residents of the state, or else it would impose burdens upon one class of citizens which do not belong to all. If the law be valid, then the legislature may render any class or classes liable beyond the amount of their contracts and regardless of the same, while all others would have the liberty of contracting freely as at present.

It is admitted in the opinion in this case in the court below (30 C. C. A. 126) "that the liability of the owner in respect to building contracts is restrained in some degree by this statute" (Ohio mechanic's lien law), but it is claimed that, as the material men put their property and labor into his building they ought to be protected, notwithstanding this obvious violation of the constitutional rights of the owner. While the doctrine has been enunciated in certain classes of cases, we have never before heard that the constitutionality of a law could be made to depend upon the size or amount of its infraction of the fundamental law, or the balancing of rights or wrongs. We have always understood that an infraction of the constitution, however slight, rendered a law unconstitutional. If this is the law, and we are certain it is, then this judgment ought to be reversed upon the reasoning of the Circuit Court of Appeals and no consideration should be given to the equitable claims of the sub-contractors. They knew, or could have known, what the contract with the principal contractor was and the times fixed for his several payments, and there is no claim made that the owner in any way varied from the terms of the contract. If equities are to be considered, why should not the rights of the owner, who has fairly and honestly entered into and strictly fulfilled his contract, be superior to those of sub-contractors and material men, who have recklessly and carelessly furnished labor and material for an insolvent contractor whom they, and not the owner, trusted.

But we do not understand this case is to be decided as between equities, but as between legal rights, for whatever may be written or said about equitable liens, these liens are wholly dependent upon the validity of this statute.

The court below admits that it interferes with and restrains the liberty of contract on the part of the owner (30 C. C. A., 126), and this admission establishes its unconstitutionality as the authorities elsewhere cited in this brief clearly establish.

The case of Weil v. State, 46 O. S., 450, cited by the court below in support of its decision (30 C. C. A., 127), shows, we think, a clear misconception of the effect and purpose of the mechanic's lien law. In the case of Weil v. State the law in question fixed the rights of the parties to a contract and it was rightly held that the parties thereto were subject to the provisions of the statute. In the case at bar the legislature has attempted, and, if the judgment of the court below is sustained, has succeeded in making a contract *for* parties. This statute does not assume to say that the owner and contractor shall be subject to certain restrictions as between themselves, by virtue of their contract, but in effect says to the owner, "although you may fulfill in good faith and to the letter your contract with the contractor, you are still liable to pay for his improvident contracts with people with whom you have had no dealings and do not even know." How this may work out can be made clear from an example: Supposing the contract provides for the construction of a building at a cost of $50,000, but for some reason, when the contractor comes to make his contract, they aggregate $60,000. Under this statute, although every dollar of the $50,000 goes to the subcontractors and the material men, they can still compel the owner to pay them the balance ($10,000), or have his property sold. In other words, this statute will deprive him of his property because of the improvident contracts of somebody else. So far from interfering in some slight degree with the owner's right to contract, as the court below admits, it seems to us utterly to destroy his right to contract and must for this reason be invalid.

The law in question is contrary to the spirit of the constitution, in violation of the great first principles of the social compact and cannot be considered a rightful exercise of legislative authority.

Calder v. Bull., 3 Dall., 386.
Gulf, Colo. & Sante Fe R. R. Co. v. Ellis, 165 U. S., 150.
Wilkinson v. Leland, 2 Pet., 658.
3 Am. & Eng. Ency. of Law, 674.
Osborne v. Nicholson, 13 Wall., 662.
Gunn v. Barry, 15 Wall., 623.

The Ohio court did not interfere with or seek to overthrow the exercise of the legislative discretion. It did not nullify the Act of 1894 on the vague ground that it was opposed to the "latent spirit" supposed to pervade or underly the constitution which neither its terms nor its implication disclose. The same court in Walker v. Cin-

cinnati, 21 O. S., 41, expressly held that the legislative powers must be exercised within the constitutional limitations.

The argument that the lien law was read into and made a part of the contracts of the lien claimants and the Hotel Company was thereby bound, is without merit.

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it never had been passed."
>
> Norton v. Shelby Co., 118 U. S., 442.
> Lion Hardware Co. v. Young, 53 O. S., 423.
> 3rd Am. & Eng. Ency. of Law, 678.
> State v. Lessees of Public Works, 3 Ohio Bull., 265.
> Meyer v. Berlandi, 39 Minn., 438.

An unconstitutional law is void, not from the time it is so declared, but from its enactment.

> Findlay vs. Pendleton, 62 O. S., p. 80-88.

Nor is there merit in the contention that the law is not obnoxious to the constitution and does not deprive the owner of his property without due process of law, because he may require a bond of the original contractor that all claims against the building shall be paid and the owner protected against all loss, cost, damage or expense outside of the original contract price. If the owner should require a bond, he would likely have to pay a higher price for his building. He would be driven to the necessity, in case the contractor defaulted, of bringing suit on the bond and the means suggested would therefore be inadequate to protect the owner against loss. Palmer & Crawford v. Tingle, 54 O. S., 423; 9 O. C. C., 710, 711. If the law is unconstitutional, it could not be rendered valid by the mere fact that the owner could relieve himself by requiring the contractor to give a bond. Bardwell v. Mann, 48 N. W. 1120 (Supreme Court of Minnesota).

> Gibbs vs. Tally, 133 Cal., 373.
> Shaughnessey vs. Surety Co., 71 Pac., 701.
> Snell vs. Bradbury, 73 Pac., 150.

If the contractor defaults, the owner, to recoup himself, must proceed in an action upon the bond and bear the expenses incident to litigation. In Commonwealth v. Perry, 155 Mass., 117, it was held that a statute which provides that "no employer shall impose a fine

upon or withhold the wages, or any part of the wages, of an employe engaged in weaving, for an imperfection that may arise during the process of weaving," is unconstitutional, because if the statute "permit the hiring of weavers only upon terms that prompt payment shall be made of the price of good work, however badly done their work may be, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one, when it declares that he has a 'natural, essential and inalienable' right of 'acquiring, possessing and protecting property.' "

A damage suit against the ordinary employe in a factory would too frequently result only in expense to the proprietor.

If it be urged that the owner may defer payment until the building is complete, the answer is that the cost of building will be increased to the owner. Comparatively few contractors are able to carry a building until it is finally completed, and rich contractors would thus monopolize the building business.

Nor is the argument meritorious that the owner may see to the application of payments under the contract. He is not required to become the guardian of laborers and material men, and to use an extraordinary degree of diligence, while none is exacted of them. Moreover, the laborers and sub-contractors are frequently wholly unknown to the owner.

The law is not relieved of its obnoxious features by the fact that the owner may be his own builder. He has a right to employ another to construct his building, which right cannot be legally denied him. The owner's occupation, habits, and tastes would frequently wholly prevent and disqualify him from constructing his own building. There are large classes so situated and so wanting in the qualifications requisite to the proper supervision of a building as to be totally deprived of the privilege of constructing homes for themselves, if compelled to give their personal attention thereto. They would in almost every instance be swindled, because they are unacquainted with the kind and character of work and the cost thereof requisite to the construction of a house.

The Federal Courts should follow the Decisions of the Supreme Court of Ohio, holding the Mechanic's Lien Law Unconstitutional.

The law of 1894 was a radical departure from former mechanic's lien laws of Ohio, which departure the courts refused to ratify. The first general mechanic's lien law of the state was enacted on March 11, 1843, (41 O. L., 66). It embodied every essential feature of the mechanic's lien law of the state in the passage of the Act of 1894. It gave a lien to principal contractors, laborers and sub-contractors, but the lien in every instance was measured by the contract made by the principal contractor with the owner. It was a derivative lien. The sub-contractor was subrogated to the rights of the principal contractor and stood in his shoes. The sub-contractor or laborer was required to file with the owner an attested account of the amount and value of the work and labor performed or material furnished, for which payment had not been made. On receipt of this notice the owner was required to retain subsequent payments due the principal contractor for the benefit of the person or persons filing such attested accounts. The owner was required to serve a copy of such attested account on the principal contractor and if such contractor did not, within ten days after the receipt of a copy of such attested account, give notice of his intention to dispute the claim, or arbitrate or adjust it with the sub-contractor, and if for ten days after the giving of such notice he should neglect or refuse to adjust or arbitrate the same, he was considered as assenting to the demand of the sub-contractor, laborer or material man and the owner was required to pay the account if he owed the original contractor a sum equal thereto. The person entitled to a lien was also required to file an account with the recorder of the county in which the improvement was made, showing the items of labor, material or machinery furnished, which account was to be recorded in a book kept for that purpose. The lien continued for two years and was enforcible by appropriate legal proceedings. A principal contractor, desiring a lien, was also required to file his attested account with the owner and also with the recorder. The significant provisions of the law were two:

First: The law provided for *notice* to the owner in all cases and notice to both the owner and principal contractor in case sub-contractors or laborers sought to acquire liens.

Second: The sub-contractor, laborer and material men were subrogated to the rights of the principal contractor.

From time to time modifications were made to the law of 1843, as on May 1, 1871, 68 O. L., p. 107. When the statutes were codified in 1880, the law as it had existed was carried forward into the Revised Statutes and remained unchanged as to the foregoing features until the enactment of the law of 1894. Among the changes made in the early legislations of Ohio was the provision that the sub-contractor by taking appropriate steps might not merely stop the funds due the principal contractor in the hands of the owner, but might acquire a lien upon the property of the owner itself.

A partial historical summary of the mechanic's lien legislation in Ohio is given by Judge Granger in his dissenting opinion in Smith Bridge Co. v. Bowman, 43 O. S., 37.

See also Rockel & White, Ohio Lien Laws, 47, 50.
Treadway & Marlatt's Ohio Mechanic's Lien Law, Chap. 1.

The Supreme Court of Ohio announced the doctrine as to mechanic's liens about 64 years ago in the case of Hampson v. State, 8 O. S., 321, 322, wherein HITCHCOCK, J., said:

> "A contracts with B to build for him a house of specified dimensions, and for a specified price. B contracts with C to do the whole or a part of the work, likewise at a specified price, and at a price less than that which he himself is to receive from A as the work progresses. A, from time to time, makes payments to B, according to his contract, and when the work is completed, pays him off in full. Afterwards it is found, however, that B has not fully paid C who has done the work, or a part of it, and C files his bill, or commences his action against A, claiming payment from him for his labor, on the ground that 'the laborer is worthy of his hire,' and that A has been benefited by his (C's) labor. True, when he performed his labor, he did it, not for, or on, the credit of A. With him he had no contract; his contract was with B, and so far as he has received payment, it has been from the hands of B. But still, inasmuch as the house, when completed, is the house of A, and is of some benefit to him, he insists that, although A has once paid for this house, he shall pay for it again. What court would, for a moment, entertain such a claim? What lawyer would commence such a suit?"

The law, as thus announced, has been maintained by an unbroken line of decisions. In Ohio the sub-contractor's position is much the

same as that of the party who garnishees another in an attachment proceeding, for as said in Copeland v. Manton, 22 O. S., 398, 403, 404, construing the Act of 1843:

> "It seems to be the policy of the act to confer upon the sub-contractor only the right to be subrogated to the claims of the contractor, under his contract with the owner, at the time the requisite notice is given. If, therefore, the contractor has *then* no claim against the owner, or there are no more payments due or to be made to *him*, the act does not in terms or effect bind the owner to retain anything for the benefit of the sub-contractor, and he obtains no lien on the amount the owner is bound in law and equity to pay to another.
>
> The position of the sub-contractors in this respect is much the same as if they had garnisheed the owner by proceeding in attachment. Both forms of proceeding are statutory remedies to subject a claim due to a debtor to the payment of his debt, and whenever available are, in effect, substantially alike. It is a fundamental principle that an attaching creditor can stand on no better footing, as against *bona fide* purchasers, or assignees of his debtor, than the latter does at the time of the attachment or garnishment."

So in the case of Dunn v. Rankin, 27 O. S., 132, it was held that "where independent jobs are let under separate contracts, though between the same owner and contractor, the liens of the sub-contractors are respectively confined to the amount unpaid on the particular contract each one aided the contractor to perform."

In the well considered case of Bullock v. Horn, 44 O. S., 420, 424, in passing on the rights of sub-contractors, SPEAR, Judge, said:

> "In giving a construction to this statute, by fair inference it may be assumed that the rights of the workman and material man, as against the owner, are based upon the latter's contract with the contractor, and while they are subordinate to the contract, and are to be worked out through it, those parties have the right to rest in security upon it and the means provided by law to secure its application to their demands. In the absence of fraud they are presumed to have notice of the terms of the original contract. Hence, if the original contract showed that payment had been made in advance to the contractor, or if it contemplated the allowance, by the contractor, of set-off then held or to be acquired by the owner as payment, such provisions would bind the workmen and material men, as they would be held to have accepted employment of the contractor with an implied assent to such terms."

When the Supreme Court of Ohio was called upon to determine the validity of the Act of 1894, in the case of Palmer & Crawford v. Tingle, 54 O. S., 423, it refused to depart from the uniform doctrine theretofore announced, and again held that all to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner, and that a direct and independent lien on the property of the owner to sub-contractors and those who furnished material or labor is unconstitutional and void.

The same principle has been announced in more recent decisions, as in Stark v. Simmons, 54 O. S., 435, and Mack v. DeGraff & Roberts' Quarries, 57 O. S., 463. There has been no change in the state of decisions on the question of mechanic's liens within the history of the state.

The lien claimants, therefore, now contesting with the hotel company, were each bound to take notice of the state of decisions in Ohio and of the uniform policy of the state on the question of mechanic's liens. The history of legislation in the state and the expositions of the law emanating from the Supreme Court were a warning to the lien claimants that the law of 1894 would be overthrown by the Supreme Court.

It was expressly held in this case in the Circuit Court of Appeals (30 C. C. A., 112), that there had been no change of judicial decision upon the subject of the mechanic's lien law in the state of Ohio, and therefore the case did not fall within the rulings in Douglas vs. Pike County, 101 U. S., 677.

As to the effect of prior decisions SAGE, J., says, 79 Fed. Rep., 483: "This case arises, not under a change of decisions, but an amendment of the statute and to apply the doctrine of Douglas v. Pike Co., 101 U. S., 677, to such a case 'would extend the rule laid down in that case beyond all precedent.'"

3d Syllabus (79 Fed. Rep., 478): "The rule that, where there are conflicting decisions as to the construction or validity of a state statute, the early decisions will be followed by the federal courts as to all rights accruing under them before the last decision, has no application where the later decision is under an amendment of the statute, constituting it a radical departure from previous legislation."

In the construtcion of the statutes and laws of the state, the general principle is that the judicial department of the state is the appropriate

organ for this purpose and that decisions of the highest courts of the state construing its statutes are binding on the Federal courts, although they may have put a different construction on them. "This rule that the Federal courts follow state decisions as to state laws and rights under them is almost invariable. Brannon on 14th Amendment, 397. "For the sake of harmony and to avoid confusion, the courts of the United States will lean toward an agreement of views with the state courts if the question seems to be balanced in doubt." Burgess v. Seligman, 107 U. S., 20. "And if the Federal court be bound by the interpretation of the Ohio statute by the State Court, it need not review the reason by which that interpretation was reached." New York Life Ins. Co. v. Cravens, 178 U. S., 389, 395.

The decision of the Supreme Court of Ohio, is founded on reason and authority, but were the Federal court to conclude otherwise, it would be immaterial, for as Justice Brewer said in Forsyth v. Hammond, 166 U. S., 518, "The construction by the courts of the state of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the Supreme Court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgment. That court is the final arbiter as to that question."

Mr. Justice Harlan in O'Brien v. Wheelock, 95 Fed. Rep., 883, sitting in the Seventh Circuit Court of Appeals, defined the attitude of the Federal Courts on pages 904 and 905 in the following language:

> "In other words, as the Act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the plaintiff were issued, it is the province and duty of this court to exercise an independent judgment as to its validity under the constitution of Illinois; but in doing this there are two principles that should not be overlooked: (1) that, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiff were proved, this court should give effect to any ruling or construction that may have been previously established by the highest court of the state in interpreting similar provisions in the constitution of 1848; (2) that the Federal courts for the sake of harmony and to avoid confusion, should 'lean toward an agreement of views with the state courts, if the question seems to them balanced with doubt,' and endeavor to 'avoid any unseemly conflict with the well considered decisions of the state courts' upon questions of local law."

The above case presented a state of facts somewhat parallel to those now before the court. Should the court not follow in the wake of the Ohio decisions, then there will be one rule for Ohio creditors, and another for those residents of another state, i. e., claimants for mechanic's liens who are residents of states other than Ohio will have a valid lien, while lien claimants residing in Ohio will not have such, and, as held in Jencks v Quidwick Co., 135 U. S., 457, this "would be unfortunate, to say the least."

The matter in controversy is one peculiarly within the domain of state control. It is of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling. It is a matter of local and non-federal concern. Every state, perhaps, has enacted a mechanic's lien law. There is great diversity in the provisions of such laws. These laws are not extra territorial in their operation. The Ohio law in question is as peculiarly local as is a statute of limitations, or a law governing voluntary assignments for the benefit of creditors, or a law in relation to fraudulent conveyances, usury, marriage contracts, or recording acts. Laws have been enacted on these several subjects by all of the states, and the decisions of the state courts on such subjects are recognized as binding on the Federal courts and are followed by them.

In Knapp, Stout & Co. v. McCafferty, 177 U. S., 638, a lien was asserted for the towing of a raft. The lien for towage was likened to that of a common carrier. The Supreme Court of Illinois held that under the laws of that state the plaintiff had a possessory lien for the entire bill upon the raft that had been towed, to the extent that it remained in the plaintiff's possession. The Supreme Court held that whatever its opinion might be, it should defer to the opinion of the state court, as the question was a local one depending upon the law of that state. The Supreme Court expressed a doubt as to whether a bill in equity lies to enforce a possessory lien, but inasmuch as the Illinois court recognized such a practice, the Supreme Court also recognized it as expressive of a local law. There was no special statutory provision in Illinois for the enforcement of the lien, but the Federal court recognized and enforced the practice of the state courts. If the law governing such a case and lien is local, it is difficult to see why a mechanic's lien law like that of Ohio is not also local in its nature.

Mr. Justice Miller in Bucher v. Cheshire, 125 U. S., 555, said: "It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or have always been a part of the law of the state, that the decisions upon the subject are usually conclusive and always entitled to the highest respect by the Federal courts. * * * Where such local law or custom has been established by repeated decisions of the highest courts in the state, it becomes also the law governing the courts of the United States sitting in that state." The laws of the several states include state constitutions, statutes, common law, and decisions expounding them. Brannon on the 14th Amendment, 393; Bucher v. Cheshire, 125 U. S., 582. In ordinary cases the decisions of the highest courts of the state with regard to the validity of one of its statutes is binding on the Federal courts. McGahey v. State of Virginia, 135 U. S., 665, 667.

If the previous decisions of the state court are so firmly established as to constitute a rule of property, then the Federal courts are governed by the previous decisions of the state courts.

Louisville v. Palmes, 109 U. S., 244.

> "The public policy of a state may be deemed to be authoritatively declared by its courts. Their evidence we cannot oppose by speculations or views of our own. Nor can such in[illegible]s and policy be changed by the contract of parties. Against them no intention will be inferred or permitted to be enforced."
>
> New York Life Ins. Co. v. Cravens, 178 U. S., 398.

It will be claimed that a large number of states have held mechanic's lien laws similar to, or embracing the same principles as, the Ohio mechanic's law, to be constitutional; but such a fact is of no consequence in the determination of this case. For instance, the statute of limitations of Nebraska and Kansas were precisely similar. The Kansas court by a uniform series of decisions, extending over a period of twenty years, held that the temporary absence of the debtor, even if he retained a residence within the state at which process against him might be served, was sufficient to take the case out of the statute. The Nebraska court held that the provisions of its precisely similar law did not include the case of a debtor temporarily absent from the state and having a usual place of residence therein at which a summons on him might be served. In a case arising under this

statute in Kansas this court said: "But what may be the law of Nebraska is immaterial. The case at bar is governed by the laws of Kansas, and the duty of the court to follow, as a rule of decision, the settled construction of the highest court of Kansas of a statute of that state, is not affected by the adoption of a different construction of a similar statute in Nebraska or any other state."

Bauserman v. Blunt, 147 U. S., 547.

If there are different interpretations in different states to a local law, that law in effect becomes by the interpretation, so far as it is a rule for action in the Federal courts, a different law in one state from what it is in another.

Union Nat'l. Bank v. Bank of Kansas City, 136 U. S., 223.

Mr. Justice Field in Louisiana v. Pilsbury, 105 U. S., 294, held that: "When a statute of two states, expressed in the same terms, is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it, in all cases arising under it." To the same effect is Morley v. Lake Shore & Michigan S. Ry. Co., 146 U. S., 162.

It was said by Judge Lurton, 86 Fed. Rep., 370, when this case was originally before this court, that the question involved is one of general law. We entertain a different opinion from the learned judge, but if he be correct, if the state statute does not violate a provision of the federal constitution, "Federal courts are not justified in running counter to the decisions of the highest court upon questions involving the construction of state statutes or constitution, on any alleged ground that such decisions are in conflict with sound principles of general constitutinal law."

Fahlbrook Irrigation District v. Bradley, 164 U. S., 112.

It may be said that there is not an unbroken line of decisions in Ohio, such as we have indicated, but that the Supreme Court in Railway Co. v. Cronin, 38 O. S., 122, and Railway Co. v. McCoy, 42 O. S., 251, held liens good under a law somewhat similar to the Act of 1894. Those cases were decided under the Act of March 31, 1874, (71 O. L., 51). The answer to this argument is that the Act was an entirely different law from that of 1894, and that the constitutionality of the law was not involved in either of those cases. Courts

do not pass on the constitutionality of laws unless the issue be made by the pleadings.

John Spry Lumber Co. v. Sault Sav. Bank & Trust Co., 77 Mich., 199.
Cooley's Constitutional Limitations, 3rd Ed., Sec. 163.
Also see Ohio cases.

An examination of the two Ohio cases last mentioned discloses that the principal contractor had not been paid. Notice to the property owner, under the law in question in them, was an essential prerequisite to the procurement of a lien. The Act of 1874 provided that if the indebtedness of the contractor or sub-contractor for labor and materials exceeded ninety per cent, of the contract price for such labor and materials in the contract between the owner of the road and the original contractor, then the owner of the road should pay to each person performing labor or furnishing materials such a per cent. of their claims as ninety per cent. of the first contract price for said labor and materials is of the aggregate amount unpaid of the indebtedness for said labor and materials. This provision alone made the law radically different from that of 1894.

The act of 1874 further provided that the contract between the owner of the road and the original contractor should provide that the labor performed and materials furnished should be paid according to the provisions of the Act by the company to the persons to whom sums were due before anything was paid to the original contractor.

These provisions really required the original contractor to give the owner of the road a list of all of his sub-contractors and laborers and the sum due or to become due to each. This is the spirit of Sec. 2 of the Act, which required that at least five days notice should be given to each contractor or sub-contractor of the time the owner of the road would make payment, and then follows a provision that in case of dispute the owner of the road should hold all funds until the controversy was determined.

The two Ohio cases last mentioned were not decided under the present law, which is an amendment to all previously existing laws. The present case, as was held by Judge Sage, arises under an amended or new law, and not a change of decisions.

Our Contention is that this is a cause in which the State Constitutional and Statutory Law of Ohio should be Applied to a Controversy about Mechanic's Liens; that the State Courts are the final Adjudicators of Questions touching the Interpretation of such Laws; and that the United States Courts are required, by their own rules, to Administer those Laws, in this case, just as the State Courts have done it.

The United States Courts have jurisdiction of this cause, not because of the subject matter of the controversy, but only because of the character of the parties—their diverse citizenship.

There would be no harmony and no uniformity in the operation of state laws, if the United States courts should refuse to abide by the decision of the state courts upon questions like those which are to be adjudicated in this cause.

The decision of the question of the constitutionality of the mechanic's lien law is not controlled by the Constitution, laws or treaties of the United States; nor is it a question of general law or commercial law, such as the law about negotiable paper, insurance and the like; nor is it a question to be controlled by principles of general jurisprudence, of national and universal application.

The question which the Supreme Court of Ohio decided in Palmer & Crowford vs. Tingle, and in Young vs. Hardware Company, *supra*, was purely one of state constitutional and local law.

The Constitution of the state, by its bill of rights, guarantees to every citizen of the state the right to enjoy liberty, and to acquire, possess and protect property. By a number of decisions of high and commanding authority it has been adjudged that the right to make contracts is embraced in this constitutional guaranty. For one of the means of acquiring property is by, and through, contracts.

Section 1, Article 1, of the Constitution is as follows:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

The principle that a person has a right to make his own contracts is, likewise, one that savors of natural justice, which is anterior to all written constitutions. Judicial judgments which limit the operation of such a principle of natural justice, ought to be expressed in the

most definite and unmistakable terms, even in the absence of a constitutional restraint.

The law can *create* contracts for a person in only a small number of instances. It may be done where a duty is cast by statute, or equity, or good conscience, or, in any way, by the law, upon a person. It may be done where one has been benefited by another who is discharging such a duty, and where one has knowingly accepted something of value from another. In these instances, and only in these instances, can the law, the legislative authority, make a contract for a person.

The Ohio Legislature, in 1894, amended the mechanic's lien statute. Separated from its parts that are irrelevant to this discussion, it conferred upon one who had done work upon, or furnished materials for, a building, pursuant to a contract with another, who had contracted with the owner to erect it, a lien for the price of his work and materials, upon the building and land. The statute bestows that right upon the sub-contractor, not only when the owner had not given his consent to it, but also when he had no knowledge whatever of it. The statute does not limit the right to the lien to instances in which the owner stood by and saw, and knew, that the sub-contractor was doing the work or furnishing the material for the benefit of his building.

The theory that the owner makes the head contractor his agent by making a contract with him for the erection of a building—an agent invested with irrevocable power, to bind the owner by contracts made with the sub-contractors—carries the doctrine or fiction of construction to an unreasonable and unjust limit. As a mode of constructing contracts for persons, without their consent or knowledge, it is almost as unreasonable as the Eiglish doctrine of constructive treason. It exemplifies how easy even judges are misled by fiction.

The Ohio Supreme Court, after mature deliberation, in the cases cited, adjudged that this statute was an invasion and violation of the constitutional guaranty of the right to acquire and possess property and make contracts. That court did not base its decision on the ground that the statute was unjust, burdensome, inequitable or contrary to economic principles, but on the ground that it contravened a constitutional right created by the state constitution.

The Question whether the Statute Violated the Constitutional Guaranty is a Legal Question. It cannot be tortured into a question of General Law or of General Jurisprudence, of National or Universal Application.

It has been claimed and argued that the rights which the Supreme Court of Ohio held were violated by the mechanic's lien statute, "are fundamental, and under the terms of popular and constitutional government, and like declarations, are to be found in all, or most, of the state constitutions."

It is true that, probably, every state constitution has a parallel provision to that quoted from the Ohio constitution, a guaranty of liberty, of the right to acquire and possess property, and to have it protected by law. If the test of a general law is that its counterpart is found in all, or a mojority, of the state constitutions, or, in the statutory law of all or a majority of the states; if the doctrine in regard to the exercise of independent judgment by the United States courts is to be extended, so that they may decide all questions that may be raised about such laws, independently of the state decisions—we respectfully submit that there will be very few questions left for the state courts to decide.

Why should the fact that other state constitutions, or the statute law of other states, have a similar provision, make the question one of general law? Why should this fact, and the further fact, if it were true that other state courts have decided the same question arising upon such a provision, differently, withdraw the question from the category of constitutional and statutory questions of a local character?

Previous to the decision of this court in 86 Federal Reporter, 370, there is no case reported in which either a Federal or a state court placed a different construction from that of the Supreme Court of Ohio, upon the same or an identcal constitutional guaranty.

In Jencks vs. Quidnick Co., 135 U. S., 457, the Supreme Court considered and decided a question somewhat analogous to the one just propounded. We quote from the opinion to disclose its scope:

"So when the highest court of the state affirms that a conveyance made by a debtor to a trustee for the benefit of creditors is valid, under the statutes of that state, we should, ordinarily, in any case involving the validity of such conveyance, follow that ruling, *even*

though that statute was common to many states, and in others, a different ruling had obtained."

There is a statute of descent in every state; there is a statute of frauds in every state; there is a statute of fraudulent conveyances in every state; but questions arising under such statutes are not, for that reason, questions of general law.

We respectfully invite the court's consideration of another view.

In Railroad Co. vs. Bank, 102 U. S., 57, Justice Clifford said that the positive statutes of states and the interpretations of the same by their own tribunals, *including rights and titles to things having a permanent locality, such as real property, furnished rules of decisions in Federal courts.*

The complainant in the cause at bar claims rights of a special nature over the real estate of The Great Southern Fire-Proof Hotel Company—a lien over its hotel building. The right which they claim is a right over real property. It was this kind of a right that the Ohio Supreme Court passed upon in the two cases in which the law was overthrown. The question which they decided was not about the construction of a contract or other commercial instrument. It was about a right to a thing having a permanent locality in the State of Ohio.

The right which the complainant claims is not a fundamental right; it is not a right secured to them by the common law.

In Van Stone vs. Stillwell and Bierce Mfg. Co., 142 U. S., 128, the Supreme Court of the United States declared that a mechanic's lien on real property is wholly a creature of statute; that it is not created by the contract between the parties.

At common law there are no common law liens of any kind upon real property. Equity raises a vendor's and grantor's lien for the purchase money, and that is all. Hence, a question about a mechanic's lien upon real property, a right to a thing having a permanent locality in a state, is not a question of general law, but of local law.

In DeVaughn vs. Hutchinson, 165 U. S., 566, the Supreme Court of the United States declared that it was a principle firmly established that, to the law of the state in which the land is, we must look for the rules which govern its descent, alienation and transfer, and the construction of wills and other conveyances.

Our answer, then, to the contention of opposite counsel, is that it is a falacy to assume that the question decided by the Supreme

Court of Ohio in the two cases cited, was one of general law; that, on the contrary, it was a question of local law; (1) because the Supreme Court construed and interpreted a constitutional provision and a state statute; and (2) because the statute in question and passed upon, was a law in regard to alleged rights to a thing having a permanent locality in the state—in short, it was a law concerning real property.

The Supreme Court of the United States, as intimated in several cases, has, in effect, decided that when even some matters of General Law are Regulated by State Statute, the Federal Courts will follow the Decisions of the State Courts Construing the Statute. If it is regulated by the State Constitution, there would be equal truth in the proposition.

In Hough vs. Railway Co., 100 U. S., 213, Justice Harlan stated the question before the court in this language:

"Be this as it may, the questions before us, *in the absence of statutory regulations by the state in which the cause of action arose*, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."

In Lake Shore & M. S. Ry. Co. vs. Prentice, 147 U. S., 101, Justice GRAY said:

"This question is not one of local law, but of general jurisprudence, on which this court, *in the absence of express statute*, regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

In B. & O. Ry. Co. vs. Baugh, 149 U. S., 368, Justice BREWER employed similar language, thus:

"But, passing beyond the matter of authority, the question is essentially one of general law. *It does not depend upon any statute;* * * * There is no question as to the power of the states to legislate and change the rules of the common law in this respect, as in others, *but in the absence of such legislation the question* is one determinable only by the general principles of that law."

The obvious converse of these judicial utterances is, that if a statute regulating the matters out of which the question grew had been in force in the several states, the Supreme Court would have followed the decisions of the state courts, unless some of the other exceptions

existed which were enumerated in the opinion rendered in Burgess vs. Seligman.

In Burgess vs. Seligman, 107 U. S., 20, is found the criterion by which it can be ascertained when the Federal courts should adopt and follow the decisions of the state courts, and when they will exercise their own independent judgment. We are willing to stand upon, and be concluded by, the decision in that case.

"Since the ordinary administration of the law," it is there said, "is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. *This is especially true in regard to the law of real estate and the construction of state constitutions and statutes.* Such established rules are always regarded by the Federal courts, no less than by the state courts, as authoritative declarations of what the law is."

In that case it was further said:

"So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

The dimensions of this decision cannot be extended beyond the plain meaning of these words.

Our opponents will probably endeavor to enlist Olcott vs. Supervisors, 16 Wall., 678, in support of their view, that the question decided in Young vs. Hardware Co., by the Supreme Court of Ohio, was neither a local question, nor one respecting the construction of the Ohio Constitution. A careful analysis of that case, however, will make it obvious that the decision does not help them. The court gave as the reason why no question of local law was decided by the State court, that it was not a question of interpretation or construction; that the meaning of no provision of the State Constitution or State statute was considered or construed by the State court. The question which was decided was in regard to the nature of taxation, what uses were public, and what were private, and the extent of unrestricted legislative power. The decision of that question did not, of course, involve, or require, an ascertainment of the meaning of any consti-

tutional provision, as the United States Supreme Court declared; nor did the Supreme Court of Wisconsin pretend that it determined the meaning of any constitutional enactment.

That case cannot, on logical principles, be assimilated to the causes under discussion. In Young vs. Hardware Company, the Supreme Court of Ohio decided a question of interpretation and construction. That court distinctly avowed that the statute creating the lien in favor of the sub-contractors was an infringement upon the constitutional guaranty of the right to acquire and possess property. That conclusion was not based upon some invisible constitutional spirit or purpose, or temperament; but the particular provision of the Constitution that was violated was specified. The court attached a meaning to that particular provision. It was interpreted, it was construed, by the court.

The fact that other state constitutions contain similar or identical provisions, does not withdraw the question which the court decided from the category of constitutional or local questions.

Two different state constitutions of the states of A and B may contain exactly the same provisions, the language of each being identical. The Supreme Court of A may fasten one construction upon it; the Supreme Court of B may construe it as meaning something else, radically different. Both decisions, we will assume, were rendered before a United States court was called upon to decide the same question in the state of A. Would the United States court follow the adjudication of the Supreme Court of the state of A, or of the Supreme Court of the state of B? We submit that this question is answered by what the United States Supreme Court said in Jencks vs. Quidnick Co., *supra.*

The United States Court should decide the question just as the Supreme Court of A state did, notwithstanding the constitutional provision construed *"was common to many states, and in others a different ruling had obtained."*

We insist that the decision of the United States Supreme Court in Burgess vs. Seligman, *supra,* does not sustain the contention of opposite counsel.

The Supreme Court of Missouri did not render its decision, until after the United States Supreme Court determined Burgess vs. Seligman, pages 32 and 33, 107 U. S.

The Supreme Court of Ohio Decided Palmer & Crawford vs. Tingle and Young vs. Hardware Company, supra, before these causes, now being argued before this Court, came into the United States Circuit Court.

The decision in Burgess vs. Seligman must be interpreted and limited by the facts in the case.

True, the transaction between the parties in Burgess vs. Seligman occurred before there was any settled construction of the statute of Missouri by the State court; but the Supreme Court of the United States did not place any stress upon that fact; the fact that the United States Circuit Court rendered its decision before the State court passed upon "the identical transaction" was the relevant master fact —the fact which controlled the decision of the court.

Nor was the diverse state citizenship of the two parties commented upon at all.

Why should there be a different Rule for a Case in which the parties are citizens of the same State, and a Case in which the parties are citizens of different States?

The Circuit Court had, and this court now has, jurisdiction over these causes, because the parties hereto are citizens of different states. There is no Federal question to be decided. The Federal jurisdiction is not exclusive, but concurrent with that exercised by the State courts. The subject of the mechanics lien statute is not a matter of Federal control. The law to be administered is not the law of the United States, but it is the law of the State of Ohio.

In Polk's Lessee vs. Wendell, 5 Wheat., 293, by JUSTICE JOHNSON, it was said:

"The sole object for which jurisdiction of cases between citizens of different states is vested in the courts of the United States is to secure to all the administration of justice, upon the same principles on which it is administered between citizens of the same state. Hence, this court has never hesitated to conform to the settled doctrines of the states *on landed property, where they are fixed*, and can be satisfactorily ascertained; nor would it ever be led to deviate from them, in any case that bore the semblance of impartial justice."

In the case of Palmer & Crawford vs. Tingle, and Young vs. Hardware Company, *supra*, the privilege and immunity of the citizens of

Ohio, who were parties to said causes, was to have a just application of the law of Ohio to their cases; and to carry out the purposes of the United States Constitution in granting jurisdiction over the causes now before this court to the United States courts, the citizens of Pennsylvania (Jones and Laughlins, Limited), are entitled to nothing more, and nothing less, but precisely the same. That is to say, they are entitled to have justice, the law of Ohio, administered to them upon the same principles upon which it was administered between the citizens of the State of Ohio in the two cases decided by the Supreme Court of Ohio.

The object of granting jurisdiction to the Federal courts where the parties are of diverse citizenship, is to put the citizens of different states upon an equality; but an expansion of the jurisdiction, such as is contended for by counsel for the other side, which would favor the citizens of other states (Pennsylvania), above the citizens of the State of Ohio, would be a mischief of the same degree and character as where a citizen of the State of Ohio should receive the benefit of the local bias of his own state court.

The Constitution of the United States leaves the people of the several states and their constitutions and laws, supreme, especially in the field of personal liberty. The people of each state having the power immediately in their own hands, are trusted to protect their own rights, in their own way. "In the sanctum sanctorum of the political temple, where liberty must either live or die, there should be no exterior control."

The jurisdiction conferred upon the Federal courts upon the ground of diversity of citizenship was not intended to impeach the spirit nor to invade the authority of the people of the states in this respect.

In some of the state conventions of the original thirteen states, it was contended that the Constitution would have that effect, and if they had not been convinced that that was not the correct interpretation of it, it would never have been ratified. In the Virginia convention, for instance, this contention was strenuously urged, when John Marshall silenced the objection by assuring the convention that the proper construction of the provision on that subject was, that even contracts were to be construed by the law of the state in which they were made.

The Supreme Court of the United States, in the case of Jencks vs. Quidnick Co., already twice cited, expressed this idea and sentiment when it said: "It would be unfortunate, to say the least, *to have this conveyance sustained as to home creditors and to void it as to foreign.*"

Is this not equally true of the parties to the cause now before this court, and of the parties in the two causes that were decided by the Supreme Court of Ohio? Would it not be "unfortunate, to say the least," to have the mechanic's lien law subverted, overthrown, as to home creditors, and sustained as to foreign creditors?

No case ought to be a controlling authority in the present controversy, as to the construction of the provision in the Ohio Bill of Rights, unless its facts were substantially identical with those before the Ohio Supreme Court. It should not be an influential authority, unless the constitutional provision construed was identical with the one that was before the Supreme Court of Ohio for interpretation.

The decision of the Ohio Supreme Court in the cases cited was rendered before the cause was instituted against The Great Southern Fire Proof Hotel Company by Jones & Laughlins. It was rendered before any United States court was called upon to decide the same question which it decided.

We concede that the United States Supreme Court has decided that the United States Courts are not obliged to conform their decisions to the last decision of the highest state court, when contracts have been made and rights have accrued thereon, on the faith of a prior contrary adjudication of the same court.

But there is no such element in the cause at bar. The Circuit Court of Appeals in deciding the case before, conceded that the contracts of Jones & Laughlins with McClain, did not belong to that category of contracts. Judge Lurton's opinion on this subject is explicit. He said:

"There has, therefore, been no such change of opinion by the Supreme Court of Ohio, as to bring into operation the rule that the rights of the parties are to be determined according to law as it had been judicially declared when the contract was made." (Page 374.)

We concede that the United States Supreme Court has decided that, when the state courts have not yet interpreted a state law, and contracts and transactions have been entered into by, and rights have

accrued thereon to non-residents, the United States courts may adopt their own interpretation of the law, and are not obliged to imitate a decision of the state courts rendered after such rights have accrued. But, even in such an instance, the same court has further declared that it is the duty of the Federal courts to incline, "to lean," to an agreement with the subsequent decision of the state court, *unless such a course would "operate as an absolute denial of justice."*

We submit that this rule should not be applied in cases which involve only a construction of law, or a state constitution or statute, as in the case at bar.

The amended bill of complaint of Jones & Laughlins does not disclose that there would be an absolute denial of justice to them, if the United tates courts should follow the decision of the Supreme Court of Ohio. There is no showing that their claims could not be collected by law from McClain, without relying upon the lien.

And there is another Consideration which we submit is Decisive of the Controversy in this Case. This is a Cause in which the Complainant below, not only did not enter into a contract, and did not acquire rights pursuant to a contract, under a particular state of decisions rendered by the State Courts, but it is also a Cause in which Complainants were warned and admonished, by prior decisions of the Supreme Court of Ohio, that the Liens which they now assert would not be Upheld. Before they made their Contract with McClain, the highest Court of the State had rendered several decisions which gave them that warning or admonition. They were decisions which foreshadowed that the State Supreme Court would pronounce such a Statute, as that under which they now assert Liens, to be Unconstitutional, if it should prove loyal to its previous judicial utterances on similar or cognate questions.

We do not mean by this that the Ohio Supreme Court previously construed statutes exactly identical with the one in controversy. We are not obliged to prove such a condition of the law in order to make it manifest that the Ohio Supreme Court had, "by a course of decisions," established a rule of action, "which it would be wrong to disturb."

It is enough if the history of its decisions discloses that it rendered such decisions on similar laws, statutes or questions.

As early as 1838, in Hampson & Parkison vs. State of Ohio, 8 O., 315, the Ohio Supreme Court declared in words of no uncertain sound, what would be the decision of that court of a question like the one now under consideration. We quote a paragraph from the opinion, on page 321, which states a hypothetical case:

"A contracts with B to build for him a house of specified dimensions, and for a specified price. B contracts with C to do the whole, or part of, the work, likewise at a specified price, and at a price less than that which he himself is to receive from A as the work progresses. A, from time to time, makes payments to B, according to his contract, and when the work is completed, pays him off in full. Afterward it was found, however, that B has not fully paid C, who has done the work, or part of it, and C files his bill, or commences his action against A, claiming payment from him for his labor, on the ground 'that the laborer is worthy of his hire,' *and that A has been benefited by his (C's) labor.* True, when he performed this labor, he did it, not for, or on, the credit of A. *With him he had no contract; with him he kept no account;* his contract is with B; and so far as he has received payment, it has been from the hands of B. But still, inasmuch as the house, when completed, is the house of A, *and is of some benefit to him,* he insists that, although A has once paid for his house, he shall pay for it again. *What court would for a moment entertain such a claim? What lawyer would commence such a suit?"* And then it was added: *"Still the case before the court is precisely the same in principle as this hypothetical case."*

In the context of the opinion the court stigmatizes the claim that was made in the case, and which it declared was precisely the same in principle as the one in the hypothetical case, and which is precisely the same as the claims made by the complainant in the cause at bar, as unjust; and the court also declared, in unambiguous language, that to compel the owner of property, who had erected a building upon it, to pay the contract price, first, to the contractor; second, to pay it over again to the sub-contractor; and third, to pay it over again to the manual operatives, would not subserve the ends of justice. (Page 323.)

This is a perfect photograph of the statute which we are now challenging. The Supreme Court of Ohio, it is true, in the case just cited, did not proclaim, in express terms, by its decision, that such a statute would be set aside as unconstitutional, but it plainly indicated that that would be the result.

By several prior mechanics' lien statutes, and by a number of decisions of the Ohio Supreme Court, which are cited and discussed in this brief, sub-contractors were compelled to acquire their liens in subordination to the contract between the owner and chief contractor; they were also, by such statutes and decisions assimilated to attaching creditors; they were also required to know what were the terms and conditions of the contract between the owner and chief contractor; and their liens were, therefore, confined to the derivative class.

This history of the law making and law expounding in Ohio, on the subject of sub-contractors' liens, should have admonished the complainant that such a statute as the one under consideration would not receive the approval of the Supreme Court, and that it would be pronounced unconstitutional.

In support of our contention, that it is sufficient, if we have proved that prior to the execution of the contract between the complainants on the one side, and McClain on the other, the Supreme Court of the state had construed a similar statute, and that it was not incumbent upon us to prove that the same court had construed the exact mechanics lien statute which is now under consideration and discussion, we invite the court's attention to the case of O'Brien vs. Whelock, 95 Federal Reporter, 883, in which the opinion was delivered by Justice Harlan. The question involved in that case related to the validity of a drain and ditch statute, and to the assessment levied for the purpose of constructing such a drain and ditch.

In the first paragraph of the syllabus the Circuit Court of Appeals expressed itself in this significant language:

"While the Federal courts, in causes in their jurisdiction involving rights arising under state statutes which had not at the time received an authorative construction by the State courts, or the validity of which had not been adjudicated, are not bound to follow a subsequent state decision as to such construction or validity, yet, in exercising its independent judgment thereon, a Federal court should give effect to rules of construction which had previously been established by the highest court of the state, and should also lean towards an agreement of views with the State court, and not act upon a different view, unless compelled to do so, *to prevent an absolute denial of justice.*"

It was contended in that case that, *as the bonds in question were issued before the State Supreme Court had rendered any decisions,*

it was both the province and duty of the Federal court to determine for itself the constitutionality of the Illinois statute, and that it should exercise its independent judgment, no matter what may have been the views expressed by the highest court of Illinois upon that question, and Burgess vs. Seligman, *supra,* was cited. After quoting from that case, and after conceding that the Federal court might exercise its independent judgment, Justice HARLAN observed:

"But in doing this there are two principles that should not be overlooked: (1) That, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiff accrued, *this court should give effect to any rules of construction that may have been previously established by the highest court of the state when interpreting similar provisions in the Constitution of 1848;* (2) that the Federal courts for the sake of harmony and to avoid confusion, should "lean towards an agreement of views with the State courts, if the question seemed to them balanced with doubt," *and endeavor to avoid "any unseemly conflict with the well considered decisions of the State courts upon questions of local law."*

We insist that these causes now in discussion should be decided by this court, in obedience to the rule announced in the case just cited.

Anterior to the execution of the alleged contracts between the original complainant and McClain, the Supreme Court of this state had established a rule of construction, when it was interpreting a similar statute to the one in controversy; and in this cause, if this court should decide the question, whether the mechanics lien statute of Ohio is constitutional, differently from the decision of the Supreme Court of the state, it would create an "unseemly conflict," upon a question of local constitutional law.

Although the exact mechanics lien law of Ohio, in controversy, had not been the subject of judicial construction by the State Supreme Court, before the alleged rights of the complainant accrued, yet a similar statute was interpreted by it, in the case of Hampson & Parkinson vs. State of Ohio, 8 O., 315, before cited and quoted. The suit there was brought by sub-contractors, just as the amended bill in this cause was filed by sub-contractors. They prosecuted their claim under a special statute, which authorized them to file an amicable suit in the Supreme Court, *and which commanded the Supreme Court of the State of Ohio to disregard the objection, that they were sub-contractors, and to decide their claims upon fair and equitable*

principles, and to award them whatever might be found due in equity and justice. The statute was silent on the subject of payments made to the contractor, just as the mechanics lien statute involved in this case is silent.

Yet the Supreme Court of the State of Ohio used the significant language, and rendered the decision against the sub-contractor, to which we have before appealed. It was a decision upon an analogous statute. It was a warning to the complainants in this cause, what the decision of the Supreme Court would be, if a statute attempting to do what this mechanics lien law tries to do, should be passed by the legislature, and should be challenged in the Supreme Court.

One of the last judicial utterances of the Supreme Court of the United States relative to the duty of the Federal courts in determining how a state constitution or state statute should be consrued, is Hartford Fire Insurance Co. vs. Chicago & Milwaukee Ry. Co., 175 U. S., 91, 20 Sup. Ct. Rep., 33. The second paragraph of the syllabus reads:

> "Questions of public policy as affecting the liability for acts done or upon contracts made and to be performed within one of the states of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application, are governed by the law of the state as expressed in its own constitution or statutes, or declared by its highest court."

A state court had decided that a contract exempting a railway company from liability for negligence was not against public policy; and the United States Supreme Court declared that that decision was not binding upon the United States Court sitting in that case. The state court decided the question twice. The first time it decided it in another case between other parties, and the decision was that such a contract was void. That decision was rendered, *after the contract,* which was passed upon by the United States Circuit Court, *was made;* afterwards there was a re-hearing granted, and the state court (of Iowa) reversed its former decision. The petition for a second re-hearing was dismissed. The case in the United States Circuit Court was pending at the time the other case was pending in the Supreme Court of Iowa. The United States Supreme Court concluded that the United States Circuit Court did right in following the last decision, instead of the first one.

This decision is decisive; it settles the controverted question in our favor. There can be no possible escape from it. Its identity on principle with this case is, on a comparison of the two conditions of fact in the cases, clear and certain.

A question touching the validity of a mechanic's lien is just as much a local question as a question in regard to the validity of a contract exempting a railroad company for liability for negligence. There are mechanics' lien statutes in every state of the Union, it is true; but it is equally true that negligence is committed by railroad companies in other states, and that contracts exempting them from liability may or may not be made in every state.

We also briefly refer to the case of Loeb vs. Trustees of Columbia Township, 179 U. S., 472, 21 Sup. Ct. Rep., 174. The fifth paragraph of the syllabus is:

> "The Federal Courts, in determining contract rights as affected by a state constitution, will enforce the contract in accordance with the constitution of the state as interpreted at the time the contract was made by the highest court of the state, without regard to a contrary interpretation made by such court after the contract was made."

The Supreme Court, approving the decision of the lower court said:

> "This was in accordance with the long established doctrine of this court, to the effect that the question arising in a suit in a Federal court, of the power of a municipal corporation to make negotiable securities, is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law, would not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation."

There were conflicting decisions of the Supreme Court of the state. The first decision was rendered in State, ex rel. Hibbs vs. Franklin County Commissioners, 35 O. S., 458; the later decisions were rendered in State, ex rel. Broerman vs. Hamilton County Commissioners, 54 O. S., 333, and Hixson vs. Burson, Id., 470.

The contract, or rather the bonds, whose validity was challenged, were executed before the last two decisions were rendered.

The Supreme Court of the state *did not construe the same statute in the conflicting cases; they were merely similar statutes; but it de-*

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cided the same question in each of the cases. It was a question of state constitutional law.

It will doubtless be contended that, upon plain analogy between mechanics' liens and other liens that are created by law, the mechanic's lien statute was just in its provisions, so far as it favored sub-contractors, and that the mechanic's lien statute was constitutional. In other words, it will be probably contended that the sub-contractor's lien is a natural equity, and that it does not depend upon a contract made between him and the owner of the property. Common law and equity liens will, probably, be used to exemplify this proposition. For instance, an artisan or mechanic who receives materials with which he constructs an article for another, or receives an article to be repaired, has a lien upon the article for his labor. An inn keeper has a lien upon the baggage and personal effects of his guests for his board and lodging. A carrier or a workman has a lien for his charges. These are examples, not exhaustive, however, of common law liens.

A vendor of land who receives a part of the purchase money has a lien upon the land for the unpaid balance; a partner who has advanced money to a firm has a lien upon the interests of his co-partners. These are some examples of equitable liens. But none of these are analogous to the liens asserted by the complainant in the cause at bar.

There is one feature, which distinguishes all of these liens from the mechanics' lien claimed, and which we are combating. It is true the liens, the common law liens, and equitable liens themselves are not CREATED by agreements or contracts. To that extent there is a resemblance. But if there had been no contracts made between the parties, in cases where common law and equitable liens arise, there never would have been any liens. *To entitle the artisan or mechanic to his common law lien there must have been a contract previously made between him and the owner of the material, by which the artisan agreed to construct something out of the material, or repair it, and by which the owner of the material, either expressly or impliedly, agreed to pay him for his labor.* To entitle the inn keeper to his common law lien, there must have been an express or implied contract between the inn keeper and the boarder or lodger, by which the inn keeper, either expressly or impliedly, agreed to board or lodge the boarder or lodger, and the latter agreed to pay for the board or lodging. In none of these instances would there be any right to a

lien if the contracts and agreements mentioned had not been made prior to the origin of the liens.

So, to entitle the vendor of land to his lien, there must have preceded the creation of the lien a contract between him and the vendee, by which the vendor agreed to sell the land to the vendee, and the latter agreed to pay for it. But no such essential feature exists in the cause under discussion. The complainant does not pretend that there was any contract or agreement made between them and The Great Southern Fire-Proof Hotel Company, by which they agreed to furnish material for the company's hotel building, and the company agreed to pay them for it.

All the common law and equitable liens which are claimed to be analogous to the mechanic's lien involved in this cause are imposed by law upon the property of the person who, either expressly or impliedly, agreed to pay the artisan or mechanic for his labor, or the inn-keeper for his board and lodging, or the vendor for his land, and it is imposed to secure the performance of such agreement. This is not true of the mechanic's lien statute in question. That statute imposes the lien upon the owner's property to secure the performance, not of his own contract, but of another's contract—the chief contractor's contract. It imposes a lien upon the property of a person to secure the performance of a contract which that person had no art or part in making.

It makes the owner of the property responsible for the delinquency of the chief contractor, whose delinquency cannot be imputed to him.

It makes him a trustee for the sub-contractor and material man.

This is the iniquity and injustice of the statute. We insist that the state has no right to impose such burdens upon the property owner.

The analogy which is sought to be drawn between the mechanics' lien involved in this cause, and the common law and equitable liens mentioned has no foundation. Analogies are always dangerous. Illustrations have no value at all, unless they are true.

The vendor's equitable lien of the land sold is not a natural equity; it is not vindicated by a sentiment of natural justice. Some writers, and probably some courts, trace its origin to the trust relation which exists between the vendor and vendee; others regard it as an equitable mortgage; and still others declare that it arises from the implied intention of the parties.

In Ahrend vs. Odiorne, 118 Mass., 261, CHIEF JUSTICE GRAY maintained that the equitable lien of the vendor was due to the "fact that by the common law, land was free from the claims of simple contract creditors, and that it was invented by the chancellors to invade this unjust rule, and to give the grantor a security for his unpaid purchase money.

But Mr. Pomeroy has assigned a different and better reason for the existence of the lien. He said:

> "It is a most natural judicial conception that upon the sale of *any thing* on credit, the very identical thing sold should be regarded in some sort as a special fund out of which payment of the price was to be obtained, or at least secured, and that the seller should not be considered as parting *absolutely* with his whole interest and dominion until the price was fully paid." (3 Pomeroy Eq. Juris, Sec. 1250.)

The case at bar is not a case in which the obligation of the contract entered into by the complainants with McClain would be impaired by following the decision of the Supreme Court of Ohio. Their contracts had no other foundation than the statute itself. The Supreme Court in Douglas vs. County of Pike, 101 U. S., 677, decided that it would give to a change of decisions of the Supreme Court of a state on a question concerning an existing contract, that effect which would be given to a legislative amendment; that is to say, make it progressive, and not retrospective.

But if the Constitution is examined from the point of view of those who framed it, it is obvious that in declaring, "No state shall pass a law impairing the obligation of contracts," it was not intended to include the decision of the court under the term "law." The mischief aimed at was in the legislature, and not in the courts, said the Federalist. That court has settled the question; for in New Orleans Water Works Company vs. Louisiana, 125 U. S., 18, JUSTICE GRAY delivered the unanimous opinion of the court thus:

> "In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decision of its courts."

The Constitution of Ohio having been made long before the contract between the complainant and McClain was made, and its rights were acquired thereon, it cannot be said that it impaired the obligations of the contracts; and the decision of the Ohio Supreme Court, in Young vs. Hardware Co. did not impair them, for the reason given by the Supreme Court in the quotation which has just been quoted.

The decisions in 38 O. S., 122, and 42 O. S., 251, will probably be relied upon to sustain the contention that the Supreme Court of Ohio had previously rendered a decision contradictory of the decision in Young vs. Hardware Co. But the radical distinctions between the statute which was construed in those cases, and the statute now under consideration are obvious. The railroad statute required the contract between the owner of the property and the principal contractor, to provide that when the claims of persons who had either done labor or furnished materials for the erection of the building or structure, should equal ninety per cent. of the contract price, that they should be paid ratably. That provision, in itself, sterilizes the decisions which counsel relied upon. As the contract had to contain such a provision, the owner of the property could protect himself against paying the contract price twice. The statute also had some other provisions which make it radically different from the one under consideration.

Other decisions of the Supreme Court of Ohio in regard to the power of the legislature over contracts may be relied upon; but no decision has been cited which decides that the legislature has a right to make contracts for people. The decisions are simply to the effect that it is competent for the legislature to regulate the terms, and to determine the effect and validity of the contracts, but no further.

It will probably be asserted that other Supreme Courts of other states have passed upon similar statutes. That statement is only true of three Supreme Courts, and in neither of those cases was the question as to whether the mechanic's lien statute violated the constitutional guaranty, which has already been mentioned, agitated or considered or passed upon. In all the other states to which reference will be made by counsel on the other side, the statutes were essentially and radically different from the statute of Ohio. The statute of New York is an illustration. It limited the lien of the sub-contractor or material man to the money that was due on the contract from the owner to the principal contractor, at the time notice was served upon the owner by the sub-contractor.

It will be argued that the law, the statute, was part of these contracts entered into between the complainant and McClain; but if it was an unconstitutional law, it could have no force or effect as part of the contract.

We contend that this is a cause in which this court should adhere to the general rule, namely, that in determining what is the law of a state, it should follow the decisions of the highest court of the state; that there is no question of general or commercial law, or general law, or general jurisprudence, or common law, involved in these causes; that these are not causes in which the court is called upon to protect contract rights which were acquired under a decision of the highest court in the state, which was subsequently overruled by the same court; and that this is a case in which the parties, who invoked the jurisdiction of the Federal courts, in the first instance, were obliged to know, from a course of previous decisions of the Supreme Court of Ohio, and especially from their imputed knowledge of the decision of the Supreme Court of Ohio in Hampson & Parkison vs. State of Ohio, 8 O., 315, that their alleged claim would not be deemed valid.

We further insist and submit that it was never intended by the constitutional provision which gives this court jurisdiction, on the ground of diversity of citizenship, that the state laws should be subjected to a correcting process, or that the state law should be given an independent development, by the Federal courts.

But, if this court should reach the conclusion that this is a cause in which it should exercise its independent judgment, then we insist that there is no reasonable solution of the question other than that which was adopted by the Supreme Court of Ohio. The right to make one's own contract embraces, *ex vi termini*, the right to help determine the price at which labor and services are to be performed, and also the mode and time for the payment of such labor, and services. The legislature can *regulate* the making of contracts, and the effect of them when made; but it cannot control the terms. It cannot make a contract for a party, when the subject of the contract is unaffected by any public interest or duty to person, society or government, and the parties have the capacity to make the contracts. The legislature has no power, either to prohibit, or to prevent persons who are *sui juris* from making their own contracts, except when it effects a public interest or some duty to other persons, to society or to government.

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THE SUPREME COURT OF THE UNITED STATES.

Sup. 165

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY,

Petitioner,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, BENJAMIN F. JONES, JR., MARY F. LAUGHLIN, MARY McM. LAUGHLIN, MAGDELAINE F. LAUGHLIN, WILLIS L. KING, HENRY A. LAUGHLIN, JAMES LAUGHLIN, JR., JAMES B. LAUGHLIN, CHARLES C. BRIGGS, ELIZA L. PHILLIPS and BENJAMIN F. JONES and WILLIAM L. JONES, trustees under the last will and testament of THOMAS M. JONES, JR., deceased, for WILLIAM L. JONES, MARY J. HILLIARD and THOMAS M. JONES, JR., partners doing business under the firm name and style of JONES & LAUGHLIN, Limited:

Respondents.

ON PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SIXTH CIRCUIT.

TALFOURD P. LINN and
OUTHWAITE, LINN & THURMAN,
Counsel for Respondents.

THE SUPREME COURT OF THE UNITED STATES.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY,

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ON PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS.

There is no doubt of the power of this Court to grant the prayer of the petitioner herein, providing the case be one in which the discretion of the Court acting in such matters, should be exercised in petitioner's behalf.

The sole question for the Court to consider is, does the case present such a state of facts, as will justify the affirmative action of the Court, by reason either of its "peculiar gravity," the "importance of the question involved," "the necessity of avoiding conflict between two or more courts of appeal or between courts of appeal and courts of the State," or some "matter effecting the interests of this nation in its internal or external relations?"

For respondents, we respectfully submit, that the case as it now stands before the Court, does not present a state of facts bringing it within the rules laid down in *Forsythe* v. *The City of Hammond*, and other kindred cases.

The record of the case shows—that on April 13th, 1894, the legislature of the State of Ohio passed an act known as the Mechanic's Lien Act, by the provisions of which, direct liens were given to all persons furnishing labor or materials in or about the construction of any building within the state irrespective of the condition of account or contract between the owner of the building and such material man or laborer, upon the compliance, by the person seeking to enforce the lien, with certain requirements of the statute;

That after the passage of the said act, and before any interpretation thereof by the Supreme Court of the State of Ohio, respondents, who were residents and citizens of the

State of Pennsylvania, furnished, for the construction of a certain building within the State of Ohio, a large amount of material;

That after said material had been furnished and used, the Supreme Court of the State of Ohio, in a suit therein pending, to which these respondents were not parties, declared such act in conflict with certain general provisions of the constitution of the State of Ohio, and liens taken thereunder invalid;

That respondents, as residents and citizens of the State of Pennsylvania, thereupon filed their bill in the Circuit Court of the United States, for the Southern District of Ohio, seeking to enforce their lien, and invoking the jurisdiction of said Circuit Court by reason of their citizenship of the State of Pennsylvania, and for the further reason that their contract having been entered into and completed after the passage of said act of the legislature, and before any interpretation thereof by the Supreme Court of Ohio, and their right of action having accrued under such circumstances, they were entitled to relief as such non-residents, and to the independent action of the United States Court, and the interpretation by the same of the constitutionality of the act in question independently of the decision of the Supreme Court of Ohio;

That the said Circuit Court thereupon decided, that respondents had a right to the independent interpretation of the United States Courts upon the constitutionality of the question involved, but that, in the opinion of the said Circuit Court, the Supreme Court of the State of Ohio was right, in declaring said legislative act unconstitutional;

That thereafter, on appeal to the Circuit Court of Appeals for the Sixth Circuit, the decision of said Circuit Court was

reversed, and said Circuit Court of Appeals decided, that respondents were entitled to the relief prayed for, and that said legislative act was constitutional;

That upon application to this Court for a writ of *certiorari* to the Circuit Court of Appeals, said writ was granted, but the case remanded for amendment for the reasons given in 177 United States Supreme Court Reports, 449.

After the adjudication of this Court upon the question of citizenship, as appears by the record, the case, after amendment as to parties, was heard in full by the Circuit Court below, and a judgment rendered upon all points in favor of the complainants below. This judgment, as also appears by the record, was reviewed in full by the United States Circuit Court of Appeals of the Sixth Circuit, and by it affirmed, after a full hearing. (See 116 Federal Reporter, 793.)

The personnel of the Court of Appeals passing upon the case at its last hearing was different from that of the Court passing upon the case at its former hearing, as reported in the 86 Federal Reporter, 370. At the first hearing of the Court of Appeals, Justices LURTON, TAFT and CLARK were present and decided the case. At the last hearing Justices LURTON, DAY and SEVERNS were present and heard and decided the case.

We have, therefore, no conflict of decision between Federal Courts upon the case. Both the Circuit Court which rendered the judgment below and the Circuit Court of Appeals which affirmed it, are in accord, and both were in accord with the judgment of the former Circuit Court of Appeals.

The only conflict of decisions is the conflict between the Federal Courts and the Supreme Court of Ohio, not upon the

facts involved in this case, but upon the bare question of the constitutionality of the law known as the Mechanic's Lien Law of Ohio.

The parties to this case were not parties to the case cited by petitioner as having been decided by the Supreme Court of Ohio, to-wit: *Young* v. *The Lion Hardware Company*, 55 Ohio State, 523, but are parties, who, by reason of non-residence alone, have invoked the independent judgment of the Federal Courts as to the validity of their claim.

The petitioner and respondents are the sole parties to this controversy, and the decisions of the Circuit Court of Appeals, and the Circuit Court were upon their rights only.

It is admitted that the decision of the Circuit Court of Appeals upon the question involved, but for the provisions of Section 6 of the act of 1891, providing for the writ of *certiorari*, would have been final.

The case presented does not affect "the interests of this nation in its internal or external relations," nor is it one which presents a question of any general importance, the sole interests involved being those of the petitioner and respondents, and the sole controversy being over the recovery of a certain sum of money. The only ground upon which petitioner insists upon its right to the writ is, that the case presents a conflict between the Federal Courts of Appeals and the Courts of the State of Ohio, and that by reason of such conflict, possibilities of future collision between such Courts may arise from such adverse decisions. In our judgment no such possibilities of collision exist. No other interests are involved than those of petitioner and respondents. The adverse decision of the Circuit Court of Appeals can affect no other interests. The decision of the Supreme Court of the State of Ohio is still the law of that State until

reversed, and must necessarily govern all persons whether citizens of that State or citizens of other States, contracting in the State of Ohio, after the rendition of such decision.

The United States Courts in any case arising upon a contract made after the rendition of such decision would be bound, under the established rules, to follow such decision, and to enforce the same as the law of the State.

The sole ground upon which relief was given respondents in this case was, that their contract was entered into and their right of action accrued before the rendition of such decision. The decision of the Circuit Court of Appeals applied to this controversy alone, and to no other controversy, and decided no rights of other persons, nor is it binding as a future rule of action in the State of Ohio upon any person therein, or upon any foreign citizen contracting therein.

In this respect the case differs materially from the case of *Forsythe* v. *Hammond*, relied upon by petitioner. In that case this Court granted the writ for the distinct reason that the adverse decisions of the Circuit Court of Appeals, and of the Supreme Court of Indiana, would involve conflicts as to other property affected by the same legislative action.

The language of the Court is:

> "That tract of plaintiffs was not on the extreme limit of the lands sought to be incorporated into the city, and if the decision of the Circuit Court of Appeals was enforced there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the Supreme Court of the State, withdrawn from the city's jurisdiction, and in fact, excepted from its territorial limits. All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for *certiorari* was made."

Relying upon the rule established in *Forsythe* v. *Hammond*, and in view of the difference between the facts in that case and the case at bar, we submit that the writ prayed for herein should not be granted.

Respectfully submitted,

TALFOURD P. LINN and
OUTHWAITE, LINN & THURMAN,
Counsel for Respondents.

15323

(18,745.)

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 165.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner,*

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN AND BENJAMIN F. JONES, JR., ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

Emphasizing the fact that the materials furnished by the respondents herein to the petitioner herein, which were the foundation of the cause of action set out in the amended bill of complaint, were furnished and delivered as appeared by the said bill of complaint, to the petitioner between April 16th, 1895, and January 29th, 1896, and were used in the construction of the building of the petitioner before the decision of the Supreme Court of Ohio in *Young vs. The Lion Hardware Company*, 55th Ohio State, 423, was announced, holding that Section 3184 of the Revised Statutes of Ohio, as amended, was unconstitutional, and before any decision of the said Supreme Court of Ohio had been rendered holding said section to be unconstitutional, we adopt the statement in the brief of counsel for petitioner as a substantial statement of this case.

The law here involved is contained in Sections 3184, 3185 and 3185a, Revised Statutes of Ohio, which sections read as follows:

> "Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well or any other well, or performs labor of any kind whatsoever, in altering, repairing, constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof, or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory, or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material or machinery so furnished, and upon the interest, lease-hold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."
>
> "Sec. 3185. Such person, in order to obtain such lien, shall, within four months of the time from performing such labor or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder and a description of the land on which the gas well, oil well or other wells are situated, or

the land on which the house, mill, manufactory, or other buildings or appurtenances, fixture, bridge or factory, or other structure may stand, or to which it may be removed, and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof, and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

"Sec. 3185a. In all cases where the labor, machinery or material referred to in Sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding sub-contractors, material-men or laborers, fix an unreasonably low price in the original contract for any work or material for which a lien is given under Section 3184, the Court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such sub-contractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

ARGUMENT

UPON CONSTITUTIONALITY OF LIEN LAW, AND EFFECT OF THE DECISION OF THE OHIO SUPREME COURT.

In behalf of respondents herein, we claim,

I.

That the decision of the Supreme Court of Ohio, above referred to, is not binding upon the Courts of the United States for three reasons:

(*a.*) The cause of action set out in the bill of complaint accrued before that decision was rendered.

(*b.*) The former decisions of the Supreme Court of Ohio, upon similar contracts and liens, are in conflict with that decision, and the cause of action of the respondents herein accrued after such former decisions were rendered.

(*c.*) The question is one of general jurisprudence, and commercial law.

II.

That the said section as amended, does not deprive the owner of property of the right of possessing and protecting the same.

III.

That it does not deprive the owner of property of the same without due process of law.

IV.

That it does not impair the obligation of contracts.

V.

That it does not deny to certain classes, to-wit, owners of buildings or other structures described in the law, the equal protection and benefit of the law as guaranteed by Article 1, Section 2, of the Constitution of the United States, and by the Constitution of Ohio, and is not in contravention of any provision of either the Constitution of the United States, or of the State of Ohio.

ARGUMENT.

THE CAUSE OF ACTION SET OUT IN THE BILL OF COMPLAINT ACCRUED BEFORE THE DECISION IN YOUNG VS. THE LION HARDWARE COMPANY.

The cause of action which is the foundation of the suit at bar, to-wit, the material furnished, was so furnished and delivered by the respondents, and used in the construction of the hotel of the appellant, before the decision of *Young vs. The Lion Hardware Company* was announced, and before any decisions holding the statute in question to be unconstitutional.

When the respondent's right of action accrued, they had the right to presume that the statute was constitutional, and that their rights thereunder would be protected. Under these circumstances, the rule, we think, is clearly established, that the Courts of the United States will act independently; and while giving due weight to the decision of the Ohio Court, will still independently decide whether or not such decision is, in fact, correct.

Upon this point we refer the Court to the following:

> "So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the Courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid any unseeming conflict with well considered decisions of the State Courts. As, however, the very object of

giving to the national Courts jurisdiction to administer the laws of the State in controversies between citizens of different States was to constitute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

Burgess vs. Seligman, 107 U. S., 32.

"The decision of the highest Court of a State, construing the Constitution of the State, is not binding upon this Court as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this Court, and when the rights which it affects here were acquired before it was made."

Carroll County vs. Smith, 111 U. S., 556.

"While the Courts of the United States accept and apply the construction of a State Constitution or of a local statute, upon which the rights of parties depend, which has been fixed by the course of decisions in the State Court, it is the settled doctrine of this Court, that rights accruing under one construction will not be lost merely by a change of opinion in the State Court; and where such rights have accrued, before the State Court has announced its construction, the Federal Courts, although leaning to an agreement with the State Court, must determine the question upon their own independent judgment."

Anderson vs. Santa Anna, 116 U. S., 356.

The rule laid down in these cases is referred to with approval in *Miller vs. Ammon,* 145 U. S., 421, and followed in the very recent case decided in the Circuit Court of Appeals of the Sixth Circuit by His Honor Judge LURTON, in *Louisville Trust Company vs. City of Cincinnati,* 76 Federal Reporter, 296. The second section of the syllabus is as follows:

"Federal Court—following State decisions—Where a contract or obligation has been entered upon or before there has been any judicial construction of the State statute upon which the contract or obligation depends, by the highest Court of the State, a Federal Court, obtaining jurisdiction of the question touching the validity, effect or obligation of such a contract will, while leaning to an agreement with the State Court, exercise an independent judgment as to the validity and meaning of such contract, and will not necessarily follow opinions of the State Court construing such statute, if such decision be rendered after the rights involved in the controversy originated."

A complete analysis of all the cases under the rule is also found in the note to *Wilson vs. Perrin,* 11 Circuit Court of Appeals Reports, page 66.

See also—

Central Law Journal, Vol. 35, p. 322.
American & English Encyclo. of Law, Vol. 27, p. 600, and notes there cited.
Boles vs. Brunfield, 120 U. S., 750.
Barnum vs. Okalona, 140 U. S., 396.

This question was elaborately discussed by His Honor Judge LURTON in the decision of this case in the United States Circuit Court of Appeals, Sixth Circuit. In the opinion there delivered (86 Fed. Rep., 372), we find the following:

"When a citizen of one State enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by the Court of the United States. That right does not by any means involve the application of a different rule of decision, for the Judiciary Act requires that the law of the several States shall be regarded as rules of decisions, in trials at common law, where they apply. But even the decision of the highest Courts of the State, by whose law the rights of the parties are to be

ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon the Courts of the United States. The question is, when does it apply? In the past this inquiry has involved no little friction between the Courts of the Union and those of the States, but the final arbiter of all such constitutional questions is the Supreme Court of the United States. So far as the inquiry is pertinent to the decision which must be here made, that Court has, in an authoritative way decided:

"*First.* That such decisions are not necessarily obligatory upon Courts of the United States where they affect contracts which were valid under the constitution and laws of the State, as interpreted and enforced by its highest judiciary tribunals at the time they were entered upon.

Rowan vs. Runnels, 5 Howard, 134.
Ohio Life & Trust Co. vs. Debolt, 16 Howard, 432.
Gelpcke vs. City of Dubuque, 1 Wallace, 175.
Olcott vs. Supervisors, 16 Wallace, 678.
Taylor vs. Ypsilante, 105 U. S., 60.
Douglas vs. County of Pike, 101 U. S., 677.
Louisville Trust Co. vs. Cincinnati, 47 U. S. A., 36 to 46."

In *Rowan vs. Runnels, supra,* Chief Justice TANEY said:

"Undoubtedly this Court will always feel itself bound to respect the decisions of the State Courts, and from the time they were made regard them as conclusive in all cases upon the constitution to their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this Court, were lawfully made." * *

"*Second.* Neither are such decisions obligatory upon Courts of the United States when thereby the validity of contracts between a citizen of the State and a citizen of another State is affected, which were

executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question.

Burgess vs. Seligman, 107 U. S., p. 20-33.
Pleasant Township vs. Aetna Life Ins. Co., 134 U. S., 67-72.
Louisville Trust Co. vs. Cincinnati, 76 Fed. Rep., 296."

This rule has been followed in the case of *Speere vs. The Board of County Commissioners*, U. S. C. C. Appeal Reports, Vol. 32, page 103. The 11th section of the syllabus of that case is as follows:

"Decisions of State Courts as to their statutes, which affect the validity of contracts between citizens of different States which were made, or under which rights were acquired, before there was any judicial construction of the statute which seemed to authorize the contracts, are not obligatory upon the Courts of the United States."

On page 113, the Court said:

"There are, however, two reasons why the decision of the Supreme Court of Kansas, to which we have averted, is not controlling in the case at bar. The first is that it was not rendered until after the rights of the plaintiff were vested under a law which stood unchallenged and without adverse judicial construction when he purchased his warrant. The plaintiff was a citizen of Illinois. He bought this warrant and thereby entered into a contract with the defendant, a citizen of the State of Kansas, before the statute in question had been declared to be void. By this action he acquired the right, under the constitution and laws of the United States, to have his contract interpreted, and his rights enforced in a Court of the United States, and a *fortiori* the right to the independent judgment of that Court upon the legal questions his case presents. This case falls within one of the recognized exceptions to the

general rule which the defendant invokes. That exception is, that decisions of the State Courts which affect the validity of contracts between citizens of different States which were made, or under which rights were acquired, before there was judicial construction of the constitution or statute which seemed to authorize the contracts, are not obligatory upon the Courts of the United States."

In his opinion delivered in this case below, Judge SAGE discussed this question thoroughly, and held that it was the duty of the Federal Courts to independently look into the question of the constitutionality of the statute involved. We quote from his opinion, 79 Fed. Rep., 480:

"The gist of the Federal cases cited is, that under the circumstances stated, the Federal Courts will not apply the original rule that the decisions of the highest Court of the State, construing and passing upon the validity of the State statute, is binding. It will be necessary, therefore, to look into the question of the constitutionality of the statutory provisions involved, independently of the decisions made by the Supreme Court of Ohio."

FORMER DECISIONS OF THE SUPREME COURT OF OHIO UPON SIMILAR CONTRACTS AND LIENS, ARE IN CONFLICT WITH THE DECISION OF YOUNG VS. THE LION HARDWARE COMPANY, AND THE CAUSE OF ACTION OF THE RESPONDENT ACCRUED AFTER SUCH FORMER DECISIONS WERE RENDERED.

The decisions of the Supreme Court of Ohio, prior to that announced in *Young vs. The Lion Hardware Company*, and in cases involving the same principle of constitutional construction, are in conflict with that opinion, and under these decisions, and under the law of Ohio, as understood and adjudicated up to that time, the act complained of was constitutional. Under such circumstances, the rule is equally clear, not only that the United States Courts in cases within their jurisdiction will act

independently, but that if they find that former decisions of the State Courts do conflict it will follow the early decisions as to all rights accruing under them, and before the last decision.

> "Indeed the duty imposed upon this Court to enforce contracts honestly and legally made, would be vain and nugatory, if it were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a State Court would be no protection to a contract, if we were bound to follow the judgment which the State Court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its Courts of Justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the State, or decision of its Courts, altering the construction of the law."
>
> *Ohio Life & Trust Co. vs. Debolt,* 16 Howard's Reports, p. 432.

The authorities upon this subject are reviewed in *Douglas vs. Pike County,* 101 U. S., 677, and the rule is there stated as follows:

> "The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as the contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

It is true there had been in Ohio no adjudication of the exact point decided in *Young vs. The Lion Hardware Company*, prior to that case; but the principles involved in that decision had been settled in many cases which are, in effect, if not in words, overruled by the last decision.

As early as the First Ohio Reports, the doctrine was announced in *Smith vs. Parsons*, p. 240, that:

> "The Legislature has a right by law to regulate contracts, to determine their effect and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continued what it was at its commencement; and it is more correct to say, that the law has in part made the contract, than that it has changed it. * * * On any other view of the question, the power of the State to legislate on the subject of contracts will be materially impaired; for if it be admitted that a bankrupt law, operating on an after-made contract in the manner prescribed and as was understood by its parties, be unconstitutional, or if the contracts be not made with reference to existing laws, so as to imply an assent to their provisions, it must follow that statutes of limitation, statutes against usury, gambling, sale of offices, frauds and perjuries, and the like, must be void, because they impair the obligation of contracts not prohibited by the constitution, and which would have been legally binding had not these statutes been made."

This decision is but a reiteration of the principle announced in the *Dartmouth College case*, and was followed and approved in *Weil vs. The State*, 46 O. S., p. 450. The Court in that case, p. 452, said:

> "Does the statute impair the obligation of contracts? It does not in terms purport to operate retroactively, or apply to contracts entered into before its enactment,

but only to those made after it took effect. The obligation of a contract, is the duty, which the law at the time of making it, imposes upon the parties. As was said by Mr. Justice WASHINGTON in *Ogden vs. Saunders*, 12 Wheat., 213, 'the law of the contract forms its obligation.' Judge COOLEY, in his work on Constitutional Limitations, p. 346, says: 'The obligation of a contract depends on the laws in existence when it was made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation, to perform them by the one party, and the right acquired by the other.' In an interesting discussion of this subject in *Smith vs. Parsons*, 1st Ohio, 236, it is said by BURNETT, J., in the opinion of the Court, that 'The Legislature has a right, by law, to regulate contracts, to determine their effect, and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract, than it has changed it.' Persons contracting after the passage of the statute, could not know the law as one impairing the obligation of contracts in the sense of the constitution, but as an act regulating future contracts and defining their effect. The learned judge further says: 'Instead of determining the valdity of the statute by reference to the alleged intention of the parties to the contract, we must fix the legal intent of the parties, as well as the nature and extent of the obligation of the contract, by reference to the statute.' And, again, 'Contracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and formed part of the contract.' "

If the authority of these cases be correct, the Legislature, having full and ample power to legislate concerning contracts subsequently made, to regulate the mode and manner of their making, and of their enforcement, has full and ample power to regulate and control and prescribe the manner and method of making and enforcing building contracts, and to fix such regulations regarding them, and to provide such security for those engaging therein, as it may see fit.

These decisions were not upon the subject of Mechanics' Liens, nor did they specifically construe building contracts; but as there is no difference in the eye of the law between building contracts and other contracts, the judicial determination that the power to regulate one class is constitutional, so long as it stands, controls and determines the power to regulate the other class, and *Smith vs. Parsons* and *Weil vs. The State,* in effect, decide that legislative power over the subject of mechanic's liens or building contracts is absolute and constitutional, and the decision is as binding as if they had had the exact question before them. But in addition to these cases there had been, before the decision relied upon by appellants, two decisions of the Supreme Court of Ohio, upon the subject of mchanic's liens, and prior to the contract set out in the complaint, which were directly in conflict with the rule announced in *Young vs. The Lion Hardware Company.*

In *Railway vs. Cronin,* 38 Ohio State, 122, and in *Railway vs. McCoy,* 42 Ohio State, 251, the Supreme Court enforced liens under the Act of March 31, 1874, 71 Ohio Laws, 51. That act was, in principle and effect, as applied to railway companies, a counterpart of Section 3184 as amended. It provided that the railway company, regardless of any contractual relations it might have with laborers or employes of sub-contractors, should pay each person performing labor or furnishing material under a contract, express or implied, with the original contractor or any sub-contractor; providing, further, for notice equivalent to that prescribed in Section 3184. The intention of the two statutes is identical, to-wit., to protect the laborer or the material man, or the sub-contractor, and to secure him the amount due for his labor or material.

In the case of the railway company the contract is specific, that such laborer or material man shall be paid. In cases arising under Section 3184 the provision is, that he shall have a lien if not paid. In neither case is there any pretense or intention that his payment shall be contingent on any amount remaining due the principal contractor. The Act of March 31, 1874, gives notice to the railway company to look out for the payment of the laborers and sub-contractors, and that if payment be made to the principal contractor, without so taking care of them, it will be at its peril. Section 3184 gives notice to the owner of the building that he must likewise look out that the laborers and sub-contractors and material men are paid, or he will be at the peril of a lien on his property.

It will be claimed, doubtless, that the cases referred to, construing the Act of March 31, 1874, did not bring directly in controversy the constitutionality of the act. The Court is not presumed to enforce an unconstitutional act, and its decisions in these cases enforcing liens was a distinct affirmance of the validity and constitutionality of the legislation.

In view of these decisions, if there were no other reason, this Court, in this case, not only is not bound by the decision in *Young vs. The Lion Hardware Company*, but under the rule should follow the principle of the prior decisions, and in so far as these respondents are concerned, enforce their lien, leaving the case of *Young vs. The Lion Hardware Company* to be a rule for cases governing contracts arising subsequently thereto.

THE QUESTION IS ONE OF GENERAL JURISPRUDENCE AND COMMERCIAL LAW.

The question of the constitutionality of mechanics' liens is not, within the meaning of the cases holding State decisions upon local statutes final, a question of purely local or State law, but is rather a question of general jurisprudence, involves public policy, relates to the unrestricted powers of the legislature, and is in a sense a question of general commercial law, and as such should be considered by the United States Court independently of, and without reference to the State decisions, except in so far as the State decision may be entitled to weight by virtue of its

reason. The Court in its decision in the *Lion Hardware Company case,* did not find that the acts in controversy violated any of the express provisions of the State constitution, nor is there any pretense that it violates any of such express provisions. The only ground of the decision was, that the act in some way violated the general and indefinite provisions of the Bill of Rights, and exceeded what was known as the general and unrestricted powers of the Legislature. The question falls directly within the scope of the decision of Justice STRONG in *Olcott vs. Supervisors,* 16 Wallace, p. 678.

The Court on page 690 says:

> "This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the Legislature had not general legislative power, or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought out in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State Court can conclusively determine for us."

As in that case, it is not here claimed, and cannot be claimed, that the Legislature has no power to legislate upon the subject of mechanics' liens. It is not claimed that it cannot control and prescribe the rules governing such liens. It was only claimed by the Court that in the particular statute the Legislature had exceeded its powers as to one of these rules or conditions.

The decision of the Court was upon a part of the constitution common to all constitutions, and was not a construction of any local or special part of the constitution. Its decision had reference as much to the constitution of one State as to

another State, and attempted to prescribe a rule of general constitutional construction which might be applicable to any other State, or even to the constitution of the United States, as to the State of Ohio. This is a question of general jurisprudence, and this Court must decide it independently. While it is true that mechanics' liens are in their nature statutory and governed by State laws, yet being a part of the statute law of every State and Territory and recognized by Congress as a part of the statute law of the District of Columbia, and in the language of Justice BRADLEY, in 113 U. S., p. 516, "Standing on the basis of natural justice," the law governing them may be considered in the same light as those governing and regulating general commercial law, and, therefore, in cases of proper jurisdiction, the subject of the independent construction of the Federal Courts, regardless of local decision. Local decisions can only be binding in cases of construction of particular local statutes, or in cases of invasion of some specific provision of local constitutions. No such decision can be binding where it affects or construes only the general powers of the Legislature over the subject.

This view contended for in the argument and brief of respondents in the lower Court was sustained by the Court of Appeals in its opinion delivered by His Honor, Judge LURTON, 86 Fed. Rep., 375:

> "With every disposition to come to an agreement with the views of the Supreme Court of Ohio, in the interest of harmony of decisions, we are, nevertheless, compelled to express our inability to assent to the conclusion of that learned and impartial tribunal as to the validity of the legislation under which complainants' rights are claimed. *The decision of that Court was not placed upon any merely local or peculiar provision of the Constitution of Ohio. The ground upon which they placed their objection to the law was, that it was an unreasonable and oppressive restraint upon the owner's liberty of contract.*"

And on page 376:

> "We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The 'rights' supposed to be violated are rights deemed fundamental under the terms of popular and constitutional government, and like declarations are to be found in all or most of our State constitutions. *The question is, therefore, one of general law, having as much reference to the constitution of any other State as to that of Ohio.*"

See also

McCullough vs. Commonwealth of Virginia, 172 U. S. Supreme Court Report, 382.

Southern Pine Co. vs. Hall, 44 C. C. A., 363.

II.

SAID SECTION AS AMENDED, DOES NOT DEPRIVE THE OWNER OF PROPERTY OF THE RIGHT OF POSSESSING AND PROTECTING THE SAME.

III.

IT DOES NOT DEPRIVE THE OWNER OF PROPERTY OF THE SAME WITHOUT DUE PROCESS OF LAW.

IV.

IT DOES NOT IMPAIR OBLIGATION OF CONTRACTS.

The lien sought to be enforced in the case at issue was for materials furnished in and about the construction of a building commenced after the passage of the act of April, 1894, and all contracts and agreements set out in complaint's Bill were made and entered into after the passage of that act.

The contract having been made during the existence of the statute, it must, therefore, be considered as forming a part of the contract, and does not impair the obligations of that contract nor deprive appellant of its property without due

process of law. The rule that all contracts are subject to the conditions and obligations imposed by existing law is too well settled to be controverted. It has been the established law ever since the Dartmouth College case, in 4th Wheaton. *Parsons vs. The State,* 1st Ohio Reports, 236, and *Weil vs. The State,* 46 Ohio State, 450, both referred to above, thoroughly discuss this question and establish the rule in Ohio.

> "The obligation of a contract," it is said, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other."
>
> Cooley on Constitutional Limitations, 6th Edition, 344.

> "The power of the Legislature, as to all future transactions, to regulate and control contracts by perscribing the manner in which they shall be made * * * by declaring what future voluntary acts of parties in relation to a particular subject-matter shall be deemed contract, and, if it pleases, by creating implications from such acts from which certain declared obligations shall flow, cannot be denied or doubted."
>
> *Steubel vs. Mil. & Miss. R. R.,* 12 Wis., 67.

> "No reason has been suggested why the Legislature could not exempt all interests in landed estate from execution and sale under judgments against the owner, and perhaps all his personal property. However this may be, it is very certain that the established construction of the constitution of the United States against impairing the obligations of contracts requires that statutes of this class shall be construed to be parts of all contracts made when they are in existence, and, therefore, cannot be held to impair their obligation."
>
> Justice MILLER in *Denny vs. Bennett,* 128 U. S., 495.

"What may be the effect of those statutes in this regard upon mortgages which were created prior to the statute of 1852, it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to the statute, but long subsequent thereto. When the complainant took its mortgage, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction. The cases referred to by counsel to the contrary, holding void a consent exacted contrary to the constitution, have no bearing upon the present cases."

Provident Institution vs. Jersey City, 113 U. S. Reports, 514.

"The inhibition of the constitution is wholly prospective. The State may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effects."

Edwards vs. Kearsey, 98 U. S., 595.

Applying this rule to mechanics' liens, Phillips on Mechanics' Liens, Sec. 30, says:

"Power as to Future Coutracts.—As to future contracts, there is no doubt the Legislature may make such regulations affecting the right of lien between the parties, and priorities of third persons, that shall be deemed advisable. Thus, an act may be passed to take effect in the future, subordinating even prior judgment and mortgage liens to subsequent mechanics' liens, but such liens as have accrued prior to the passage of the act cannot be thus affected. Neither can the lien be extended so as to impair the obligation of contracts or

liens of duly recorded incumbrances antecedent to the act. If enacted by prior statute, mechanics' liens may be made liens on all the property possessed by the debtor. On the other hand, the Legislature has the right to prefer any other lien over those of mechanics; and where it declares that a widow's lien shall be preferred, excepting those of vendors for purchase money or real estate, the rule of *expressio unius alterius* prevails, and mechanics' liens will be subordinated to the widow's right. Indeed, there is no provision in the constitution which precludes the Legislature from declaring a statutory lien, in respect to future contracts, in favor either of the contractor or the laborer, upon the land of the owner, at whose instance and for whose benefit the services are preformed. Every contract is presumed to be executed with reference to existing laws, and subject to such modification, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection.

"The constitutional validity of such statutes securing to sub-contractors, and others furnishing labor or material for a contractor, irrespective of the state of account between the owner and the contractor, is well established; and it is established upon the ground that such statutes annex the lien as an incident to the contract to the owner with the contractor, such contract being the evidence of the authority of the contractor to charge the owner's property with liabilities incurred by him in performing his contracts."

Jones on Liens, Vol. 2, p. 286.

"Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed or the promised materials are furnished,

> the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time."
>
> *McMurray et al. vs. Brown*, 91 U. S. Reports, p. 266.

The contract then, following the language of *Smith vs. Parsons*, having received its impress from the law, and being co-existent with it, and, therefore, not being injured or impaired by the law, the owner of the building against whom the lien or contract is sought to be enforced, cannot be said to be deprived of his property without due process of law. Ample means are given him to avoid any injurious consequences arising out of the law. He can be his own builder. He has his remedy by suit against the contractors in case he has to pay for material or labor not paid for by the contractor. He can demand a bond and protect himself against the laches of an irresponsible contractor. He can arrange his payments so that the time limited by the statute for the filing of a lien shall have expired before the payments are made. He can see himself to the application of payments when made, and to the claims of sub-contractors, material men or laborers. There is no necessity for any prudent man being injured, in any way, by the provisions of the existing statutes. If he is injured, it is only because he has failed to take the necessary precautions due from every person entering into contracts of any sort with another. The law affords him ample remedies, and if he fails to take advantage of them, it is his own fault.

In considering this branch of the case, His Honor, Judge LURTON (86 Fed. Rep., 387), said:

> "If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law,"

and cites in support of this —

Edwards vs. Kearsey, 96 U. S., 595.
Greenwood vs. Freight Co., 105 U. S., 13.
Denny vs. Bennett, 128 U. S., 489.
Smith vs. Parsons, 1 Ohio, 236.
Weil vs. The State, 46 O. S. 450.

And on page 388 of the report he further says:

> "Neither can the owner, be said, to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

THE SAID SECTION DOES NOT DENY TO CERTAIN CLASSES, TO-WIT: OWNERS OF BUILDINGS OR OTHER STRUCTURES DESCRIBED THEREIN, THE EQUAL PROTECTION AND BENEFIT OF THE LAW AS GUARRANTEED BY ARTICLE I, SECTION 2, OF THE CONSTITUTION OF THE UNITED STATES, AND BY THE CONSTITUTION OF OHIO AND IS NOT IN CONTRAVENTION OF ANY PROVISION OF EITHER THE CONSTITUTION OF THE UNITED STATES OR THE STATE OF OHIO.

It is claimed by counsel that the whole subject of mechanics' liens comes within the limits of so-called class legislation, and is, therefore, inhibited by the guaranty of equal protection and benefit to all people. So far as we have been able to find, there are but two adjudicated cases in which the power of the legislature to pass any mechanics' lien law, has been questioned upon this ground.

> "The lien given to mechanics on the land upon which they have erected a building, the lien of the landlord upon the growing crop of his tenant, the exemption of certain articles from legal process in favor of heads of families, and of a portion of his earnings in favor of the laborer are instances of such legislation about the constitutionality of which there has never been any doubt."
>
> *Davis vs. The State*, 3 Lea. (Tenn.), 380.

> "Nor is the grant of this remedy by motion in violation of Sec. 8, Art. 2, of the Constitution, which forbids partial or class legislation. Every citizen in the

State may bring himself within its operation by contracting for the erection of a house, which most men do, in the couse of a life time."

"Whether a given law may be extended to any member of the community who may be able to bring himself within its provisions is the correct criterion by which the Courts are to determine its validity or invalidity under that section of the constitution."

12 Heisk, 633;
14 Lea, 520;
16 Lea, 71;
86 Tenn., 272;
3 Lea, 380;
87 Tenn., 214;
10 S. W. R., 353.

"After very careful consideration of all the sections of the act, we have no hesitancy in holding them to be constitutional and valid."

Cole Manufacturing Co. vs. Falls, 90 Tenn., 471.

That legislation of this character is not such as is prohibited for the reason that it confers unequal benefits, or imposes unequal burdens, and is not class legislation, seems to us beyond controversy. It is confined to no particular class, nor to any particular calling, but applies to all alike, who are erecting or who may erect buildings or other structures mentioned in the act, and to all who contribute anything of any nature be it either in work or materials, to the erection of such building or structure.

"Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors, or married women, bankers or traders, and the like. The authority that legislates for the State at large must determine whether any particular rules shall extend to the whole State and all its citizens, or on the other hand, to a

subdivision of the State, to a single class of citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislators may, therefore, prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. The discriminations are made constantly, and the fact that the laws are of a local or special operation only, is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a special lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the Legislature must judge."

Cooley's Constitutional Limitations, p. 482.

"The special regulations for one kind of business which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon another business of a different kind. The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or

are held entitled to different privileges under the same conditions; it is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

Hing vs. Crowly, 113 U. S., 708.

"The fourteenth amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civic rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs and enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessity of society, legislation of a special character having these objects in view, must often be had in certain districts, such as for

draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fire, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just grounds of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it effects alike all persons similarly situated, is not within the amendment."

Barbier vs. Connolly, 113 U. S., 31.

It is true that the Court in that case was construing so-called police powers. But the "police power" is a broad and comprehensive term. It is "broad and plenary as the taxing power (as defined in *Coe vs. Errol*, 116 U. S., 517), and property within the State is subject to the operation of the former, so long as it is within the regulating restrictions of the latter."

Kidd vs. Pearson, 128 U. S., 1.

It covers all things which tend to conserve and promote the public health, welfare and convenience, and certainly the erection of buildings come within the scope of such powers. The universal occupation of mankind is, out of the products of the earth, to add to it again, in the shape of buildings, or other structures contemplated by the statute. The lien provided is upon all conceivable human constructed objects attached to the earth or upon or in the water. No possible subject is more appropriately within the "police power," nor more necessary to the welfare of society.

See—

Lehman vs. McBride, 15 O. S., 473;
City of Cincinnati vs. Caroline Steinkamp, Weekly Law Bulletin, Vol. 35, p. 185;
Kelly vs. The State, 6 O. S., 269;
McGill vs. State, 40 O. S., 328;
State vs. Powers, 38 O. S., 54.

> "And by the equal protection of the laws is meant equal security under them to every one on similar terms, in his life, his liberty, his property, and in the pursuit of happiness."

Railroad Tax Cases, 13 Fed. Reporter, 722;
County of Santa Clara vs. S. P. R. R., 18 Fed. Rep., 385 .

There are upon the statute books of Ohio many laws which apply only to certain classes, the constitutionality of which has never been doubted. The exemption of the homestead, or of a sum in lieu thereof in favor of the head of the family; the exemption of a portion of wages and of certain goods and chattels from execution, apply only to a portion of the citizens, but the power of the Legislature to enact such a law has never been questioned.

The law regulating the rate of interest is another law of the same class. But the Supreme Court of Ohio seems to have no doubt of the constitutionality of such an act, for in *Smith vs. Parsons* it says:

> "It is admitted that the States have not given up the entire power of legislating on the subject of contracts. They may, for instance, pass laws preventing usury, and fixing the interest of money."

Applying the rule of *Barbier vs. Connolly*, 113 U. S., 32, the mechanics' lien operates alike upon all persons and property under the same circumstances and conditions. It affects alike all persons similarly situated, and is not obnoxious to the constitution of either Ohio or of the United States.

The common law gave to the warehouseman and wharfinger a lien on the goods deposited with him for his labor;

to the inkeeper upon the effects of his guest for food and lodging, recognizing the natural necessity and justice of imposing upon and imparting to such contracts burdens not agreed upon specifically by the contracting parties.

Arising out of and suggested by such common lien law upon personal property has grown the legislation under consideration. Possession of the real estate cannot be held by the laborer or mechanic until his claim be paid, therefore out of necessity the law has protected him.

> "Its principles are believed to be founded on natural justice and equity, in that he who shall have enhanced the value of the real estate by his labor, or by the materials supplied in its erection, shall have a preferred claim on the property to secure the payment of such labor and materials."
>
> Overton on Liens, 533.

DECISIONS IN OTHER STATES HOLDING MECHANICS' LIEN STATUTES, SIMILAR TO THAT OF OHIO, TO BE CONSTITUTIONAL.

Legislation of the sort complained of, is neither new to the statute books, nor to the Courts of last resort in the various States. In nearly all of the States of the Union identical or similar statutes, under similar constitutions are, and have been, in force for many years.

The Supreme Courts of over twenty States have passed upon them. Every question raised as to the constitutionality of the act has been repeatedly adjudicated previous to the Ohio decision, and with two exceptions, viz.: The Supreme Court of Michigan in *Sphey vs. Sault St. Marie Savings Bank*, 77 Michigan, 199, and the Supreme Court of Pennsylvania, in *Waters vs. Wolf*, 162 Pa. State, 153, all Courts of last resort, have held the legislation constitutional, neither in violation of the obligations of contracts, nor a seizure of property without due process of law.

In New York the constitutionality of an act like the Ohio act was twice raised, and both times the act held to be constitutional. The New York Statute is as follows:

"SECTION 1. Any person or persons, firm or firms, corporations or association, who shall hereafter perform any labor or services or furnish any materials which have been used or which are to be used in erecting, altering, or repairing any house, wharf, pier, bulk-head, bridge, building or appurtenance to any house, building, and building lot, including the fences, sidewalks, paving, fountains, fish-ponds, fruit and ornamental trees, or who shall hereafter perform any labor or services, or furnish any materials which have been used or which are to be used in improving, or equipping any house, building, or appurtenance with chandeliers, brackets, or other fixtures, or apparatus for supplying gas or electric light with the consent of the owner as hereinafter defined, or his agent, or any contractor, or sub-contractor, or any other person contracting with such owner to erect, alter, repair, improve or equip as aforesaid, within any of the cities or counties of this state, may, upon filing the notice of lien prescribed in the fourth section of this act for a lien, for the principal and interest of the price and value of such labor and material, upon such wharf, house, pier, bulk-head, bridge, building or appurtenance, as upon the lot, premises, parcel or farm of land, upon which the same may stand or be intended to stand to the extent of the right, title, and interest at that time existing of such owner, whether owner in fee of the estate, or whether a lessee for a term of years, or vendee in possession under a contract existing at the time of filing of such notice of lien, or of the owner of any right, title or interest in such estate which may be sold under an execution under general provisions of the statute in force in this State relating to liens of judgment and enforcement thereof, etc., but in no case shall such owner be liable to pay by reason of all the liens filed pursuant to this act, a greater sum than the price stipulated and agreed to be paid in such contract and remaining unpaid at the time of filing such lien; or in case there is no contract then the amount of the value of such labor and material then remaining unpaid."

In discussing the constitutionality of this section the New York Supreme Court in *Blauvelt vs. Woodworth*, 31 N. Y., 285, said:

> "It is insisted that if this be the act, it is unconstitutional and void, as it may enable the claimant to reach the property of a third party without due process of law. There is no provision in the constitution which precludes the Legislature from declaring a statutory lien in respect to future contracts in favor either of the contractor, sub-contractor or the laborer, upon the land of the owner, at whose instance, and for whose benefit the services are performed.
>
> "The act of 1852 was in force when the contract in question was made; and every contract is presumed to be executed with reference to existing laws, and subject to such modifications, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection."

The question of the constitutionality of this section was again raised in the case of *Glacius vs. Black*, 67 N. Y., 567. In its opinion rendered in that case the Supreme Court of New York said:

> "There is no constitutional objection to the creation by the legislature of statutory liens in favor of mechanics and others, for the purposes, and under the circumstances and limitations specified in the statutes known as the Mechanics' Lien Laws."

By the Court:

> "The constitutionality of the legislation known as mechanics' lien laws, was affirmed in *Blauvelt vs. Woodworth*, 31 N. Y., 285, and the Court held there was no constitutional objection to the creation by the Legislature of statutory liens in favors of mechanics and others for the purpose and under the circumstances and limitations specified in those statutes.
>
> "Laws of similar character have been in force in this State for more than forty years (Laws of 1844, Ch. 220), and similar legislation is found on the statute

books of many of the States. These statutes have been frequently under consideration by the Courts, and so far as we have known, their constitutional validity has never been judicially questioned.

"We do not doubt the soundness of *Blauvelt vs. Woodworth,* and if the question admitted of doubt, we should not feel at liberty, under the circumstances, to consider the decision in that case."

In the case of *Gunney et al. vs. Walsham,* 16 R. I., 698, the constitutionality of an act similar to the act of Ohio was affirmed, and in its opinion the Supreme Court of Rhode Island said:

"Chapter 696 is not unconstitutional as regards an owner of an estate who makes a contract for the erection of a building thereon after the laws went into effect, though at the time the material-man recorded his lien the contractor had been paid in full.

"We do not think that said chapter can be held to be unconstitutional, as regards the defendant, because it impairs the obligation of contracts. The chapter was passed and went into effect before the defendant's contract in May, was entered into, and, therefore, said contract must be held to have been entered into subject to its provisions."

Section 1183 of the California Statutes providing for a lien for mechanics, material-men, contractors, and sub-contractors, etc., is a law similar to the Ohio Statute. In the case of *Hicks vs. Murray,* 43 Cal., 514, the constitutionality of the act was affirmed. In its opinion, the Supreme Court of California said:

"The mechanics' lien law of 1868 is not open to objection that it is unconstitutional on the ground that it attempts to appoint agents for private persons nor that it confiscates property, nor as to the notice required of owners as to the responsibility for improvements, nor that it attempts to take away vested rights or clothe private persons with power to divest citizens of their property."

In *Atwood vs. Williams,* 40 Me., 409, the Court held, under a similar statute, that the material-men and laborers might enforce their claims as against the owner even though the contractor, under and for whom they worked, had been paid in full.

The Maine Statute there construed was as follows:

> Chapter 125, Sec. 35: "Any ship carpenter, caulker, blacksmith, joiner or other person, who shall perform labor or furnish materials, for or on the account of any vessel, building or standing on the stocks, or under repairs after having been launched, shall have a lien on such vessel for his wages, or materials, until four days after such vessel is launched, or such repairs afterwards have been completed, and may secure the same by an attachment on said vessel within that period, which shall have precedence of all other attachments.
>
> Sec. 37: "Any person who shall perform labor or furnish materials for erecting, altering, or repairing any house, or other building, or appurtenances, or furnish labor or materials for the above purposes by virtue of any contract with the owner thereof, or other person who had contracted with such owner, shall have a lien to secure the payment of the same, upon such house, or building, and the lot of land on which the same stands, and upon the right of redeeming the same when under mortgage, and such lien shall continue in force for the space of ninety (90) days from the time when such payment becomes due."
>
> See also, *Spoffard vs. True,* 33 Me., 283.
> *Taggart vs. Buckmore,* 42 Me., 77.

To the same effect is *Taylor vs. Murphy,* 148 Pa. State, p. 337, although this is one of the cases relied upon by the appellant. The Court there say:

> "It is no defense to such lien that the aggregate amount out of the liens entered against the building, together with the costs of building the same, exceed the contract price, if the materials furnished are of the quantity and quality needed for its construction."

"As soon as owners of lots cease to be their own builders, they put it in the power of persons employed by them to occasion losses to mechanics and materialmen which they ought not to bear, and it was to remedy this mischief that the Legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just, but a convenient one."

Wheeler vs. Miller, 18 Pa. State, 52.

Section 6229 of the Revised Statutes of Minnesota provides as follows:

"All persons who have performed labor, or furnished skill, material or machinery for the construction, alteration or repair of any boat, vessel or other water craft, or for the erection, alteration, repair or removal of any house, mill, manufactory or other building, or appurtenance, or any fixture, fence, wharf or other structure, by virtue of a contract with, or at the instance of, the owner thereof, or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the contract price or value of the same upon such boat, vessel or other water craft, and upon such house, mill, manufactory or other building, or appurtenance, or fixture, bridge, wharf, fence or other structure, and upon the right, title and interest of the owner thereof, and in and to the lands upon which the same is situate, or to which it may be removed, not exceeding forty acres. If without the corporate limits of any city or incorporated illage, and if situated upon or removed to lands within the corporate limits in such city or incorporated village, then, in and to the lot of land upon which the same is situate or to which it may be removed, not exceeding one acre in extent."

This statute was held to be constitutional in the cases of

O'Neil vs. St. Olaf's School, 26 Minn., 329.
Bohn vs. McCarthy, 29 Minn., 23.
Laird vs. Noonan, 32 Minn., 358.

In the last named case the Supreme Court of Minnesota, in its opinion, said:

"As such liens are encumbrances upon the owner's title, they can only be created by his consent or authority; and it is upon this ground that such legislation is supported. The statute annexes the lien as an incident to the contract of the owner with the contractor or builder, and such contract is the evidence of the authority of the latter to charge the building and land with liabilities incurred by him in performing his contract. The owner consents to this power conclusively and irrevocably, so far as others than the builder are concerned, by making a contract while such is the law."

"As respects the amount which may thus be secured, their rights are not dependent upon or limited by the amount due the contractor from the owner under the original contract, nor by the state of the accounts between them. It is sufficient that the liens are created through the owner's contract, from which his consent is implied. To avoid the encumbrance of such liens the owner takes the burden of securing the bond which is authorized by the act to take. Whether the burden of taking such proceedings for his own protection should thus be cast on him, or whether subcontractors and laborers should be left to proceed against the amount due, as under the former practice, was entirely a question of legislative policy. And this is sufficient to dispose of the objection that the law unreasonably limits the exercise of the owner's discretion as to the person whom he shall contract with; that is to say, to such as can give bonds or are financially responsible for the contracts they may make in the prosecution of the work. It is strictly in conformity with the policy which allows a lien in any case. It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expenses incurred."

Spoffard vs. True, 33 Me., 283.
Taggart vs. Buckmore, 42 Me., 77.

"It is ordinarily understood, from the nature of the case, that under building contracts the work is not to be done wholly by the contractor; and it is a sound and just principle that all those who have, by consent of the owner, or in pursuance of contracts with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services have been discharged."

In Tennessee just such an act as the act herein complained of was upheld, though most vigorously assailed, as beyond legislative power. One of the most recent and thoroughly considered cases upon the subject is that of *Cole Manufacturing Company vs. Falls*, 90 Tenn., 471:

"1. Act Tenn., 1889, Ch. 103, which provides that every person who is employed by the contractors to furnish materials for a building shall have a lien on the building for the same, provided that within thirty (30) days after the building is completed, he shall notify the owner that he claims a lien, is not unconstitutional in that it allows the taking of property without due process of law."

By the Court:

"The lien given by act of 1845 has been endorsed by this Court, in many cases, without the expression of even a doubt as to the constitutionality of the enactment; and there is as little room for doubt with respect to the validity of the amendatory act of 1881. The corresponding provision of the act of 1889 is assailed upon the presumption —

"(1.) That it undertakes to appropriate the property of the owner for the benefit of a person with whom he had made no contract.

"(2.) That this result may be accomplished, though the owner has no notice of the claim until after he has paid the original contractor in full, and,

"(3.) That the aggregate of the claims of sub-contractors and material-men may exceed the amount

agreed to be paid the original contractor, in which case the owner may be compelled to pay more than the contract price for the advantages received. The provisions are not fairly subject to all these animadversions, and such of them as are well made do not render it obnoxious to the constitution. It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not invalidate the act, for the owner must be held to have a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor and gave out his work in reference to that law. The right of lien to sub-contractors and material-men is, by operation of law, incorporated into and made part of the owner's contract, as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the sub-contractor and material-men in certain contingencies, hence the owner who makes the contemplated contract cannot justly complain of the legal result; especially when he receives the benefit of the labor and material of those for whom the lien is provided and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing.

"We find no valid constitutional objection to the first section of the present act. It does not provide for or allow the taking of property without due process of law or the law of the lands, and hence is not in violation either of Section 1 of the 14th amendment of the Constitution of the United States, or of Section 8, of Article 1, of the Constitution of Tennessee. Statutes similar to the provision made in the first section of our act of 1889 have been upheld and approved by the Supreme Court of the United States, and by the Courts

of last resort in most of the States of the Union. In a very small minority of the States has the validity of such legislation been denied by the Courts."

See also *Reeves vs. Henderson*, 90 Tenn., 521.

"The act of the legislative assembly, appr. January 12, 1872, (Code Ch. 40), secures liens to mechanics for their labor, and confers upon the District Court chancery jurisdiction to determine the rights and priorties of the liens of mechanics and mortgagees.

"The sixth section of the organic act of the territory provides: 'That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and provisions of this act.' Held, that said act of the legislative assembly is constitutional, and also that said act secures a lien to a mechanic for work which has not been performed under any contract."

2 Montana, 115.

Sections 3018 and 3020 of the Connecticut statutes provides:

"Section 3018: Every building in the construction or repair of which or of any of its appurtenances, any person shall have a claim for materials furnished, or services rendered, exceeding $25.00 in amount, by virtue of an agreement with or by consent of the owner of the land on which such building is erected, or such persons have authority over the original acting for such owner in procuring such labor or materials shall, with the land on which the same may stand, be subject to the payment of such claim, and said claim shall be a lien on such land, building or appurtenances, and shall take precedence of any other encumbrance originating after the commencement of such service or the furnishing of such materials."

"Section 3020: No person other than the original contractor for a building, or a sub-contractor whose contract with the original contractor is in writing, and

has been assented to in writing by either party to such original contract, shall be entitled to claim any such lien unless he shall, within sixty days from the time he shall have commenced to furnish materials, or rendered services, give written notice to the owner of such building that he has so commenced to furnish materials or rendered services, and intends to claim a lien therefor on said building. No sub-contractor with or without a written contract complying with the provisions of this Section shall be required to obtain an agreement or consent of the owner of the land as provided in Section 3018 to enable him to claim a lien under this Section."

Construing this Act, the Court say:

"To apply and enforce the statute in a case like this works no injustice. Every owner of real estate knows the law. When he employs an agent to construct or repair a building, he knows the liability he incurs under the lien law, and may easily protect himself, and it is not unreasonable to require him to do so; while it would be hardship to require mechanics, when the owner is unknown, to know the terms of the agency, and to ascertain the nature and extent of the private instructions to the agent. We conclude, therefore, that the peculiar principles of the law of agency, which relate to undisclosed principals, must yield to the provisions of the statute."

Paine vs. Tillinghast, 52 Conn., 532.

1. "Kentucky Statutes 2463, giving a lien to a person who performs labor or furnishes material, in the erection of a building by a contract, that 'The owner, contractor, sub-contractor, architect or authorized agent' is not unconstitutional, though it gives a lien without regard to the state of the account between the owner and the contractor."

Hightower vs. Bailey et al., Court of Appeals of Kentucky.

56 Northwestern Reporter, page 147.

By the Court:

"This Statute is radically different from our former law on this subject, and has not heretofore been before this Court for construction. The preceding Statute, while giving liens to contractors, sub-contractors, material-men and laborers, practically thereby provides a process of garnishment in the hands of the owner of any money he might owe the contractor. Its progress was merely to subject the contractor, material-man, and laborer to the rights of the contractor and was effectual only in the event the owner was indebted to the contractor, it was entirely safe for the owner, without notice of the claims of others, to pay his contractor when he pleased, even in advance. The present Statute has clearly meant to fasten, and does fasten, on the property of the owner a lien for the claim of the sub-contractor, material-man and laborer, although the owner has no notice of such claims, and may owe the contractor nothing. When applied to the facts of this case, assuming that Hightower is a material-man and Clark a sub-contractor, within the meaning of the Statute, the law gives Hightower a lien on the lot and improvement of Walling & Company, without regard to the state of account between the owners and the contractors. * * * The law under which a contract is made is a part of the contract, as much as though it were incorporated into it. When appellant contracted with the defendants, Smith Brothers, whereby he contracted to pay them for the erection of the building as it progressed, and did so, it was at his risk, for the law which was part of the contract, said: 'If there are sub-contractors who furnished material or performed work for this contractor, they shall have their full pay; if the contractor does not pay them, the owner of the building must pay them; if he does not, they shall have a lien upon the building for sixty days, at least, to enforce their payment.' The inconveniences of the law do not seem to us to be insuperable. They are based upon the rule or supposed hardship that in many instances it subjects the owner to the

liability of making double payments for the same work or material, and prevents him from making contracts for the erection of building, and the furnishing of materials to be paid for otherwise than in money and many other similar inconveniences. These might have much force, if addressed to the Legislature, the law-making body, and we may have very serious doubt as to the policy or the necessity of such a law, and we might with propriety recommend to the Legislature that it would be wise and beneficial that it should be changed in this particular; yet these considerations cannot have much weight against the clear unequivocal terms of the Statute."

"1. A sub-contractor who furnishes materials, and lumber, or labor, not to the owner, but to the contractor, for the erection of a new building, can under the provisions of Sections 5469 and 5470, Comp. laws, acquire and enforce a lien on the building, and on the interest of the owner of the real estate on which the building stands, to the extent of the value, or the price agreed to be paid by the contractor for the material, lumber or labor furnished.

"2. A lien, if filed within 60 days after the delivery of materials or lumber, or after the labor is performed, is not defeated by the fact that the owner, before the filing of such lien, has paid the contractor in full for the work and materials performed and furnished.

"3. If a sub-contractor files his claim within 60 days after he has furnished the material, or performed the labor, he is entitled to his lien without any further notice than such filing may give the owner.

"4. It is not the contract between the contractor and the owner which supports the lien under the statute, but it is the use of the materials and work upon the premises, the putting of them into the building, and attaching them to the freehold, whereby the owner is benefited by them, which entitles the party furnishing them to a lien to the extent of their value."

First four sections of the syllabus in case of *Albright et al. vs. Smith,* Supreme Court of South Dakota, 51 Northwestern Reporter, page 590.

"The law is remedial in its character, and is intended to secure the parties entitled to its benefits for their work and material, provided they employ the means, and adopt the rules fixed by the law to obtain and secure their rights."

Overton on Liens, 532.

"Sec. 3313, Rev. Stat., as amended by chapter 33, laws of 1889, giving sub-contractors a lien for the amount of their claims for labor performed or materials furnished in or about a building without regard to the contract price of the building, or the sum due from the owner to the principal contractor, but providing that the principal contractor shall defend any suit to enforce such lien, and giving the owner a remedy over against him, is a valid law."

Mallory vs. LaCrosse Abbatoir Co., 80 Wis., 170.

"The power of a Legislature as to all future transactions to regulate and control contracts, by prescribing the manner in which they shall be made, by declaring what future voluntary acts of parties in relation to a particular subject-matter shall be deemed a contract, and, if it pleases, by creating implications from which certain declared obligations shall flow, cannot be denied or doubted."

Mallory vs. LaCrosse Abbatoir Co., 80 Wis., 177.

"The right to enforce a mechanics' lien against the property of the owner in the case of materials furnished his contractor, is not founded upon privity of his contract with the owner, but rests solely upon statutory law. The lien attaches upon delivery of the material, and upon compliance on the part of the material men with the provisions of the law, and this, too, irrespective of a contract, either express or implied, on the part of the owner.

"The right of the material-man to his lien does not depend on, nor is it in any manner affected by the

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question whether the owner has or has not money in his hands due the builder, nor whether the former has performed his part of the contract to the letter."

Treusch et al. vs. Shyrock et al., 51 Md., 162.

The validity of an act similar to the act herein complained of was sustained in the Supreme Court of Indiana in the case of *Colter vs. Frese*, 45 Ind., 96.

The same question was also considered by the Indiana Court in the case of *Andis vs. Davis*, 63 Ind., 17-20. In that case the Court says:

"In this case the owner had fully paid the contractor before notice was filed, and the Court say that the facts alleged in that part of the answer were not sufficient to constitute a defense to appellee's action by his compliance with the requirements of the statute, and appellee had acquied a valid lien upon the appellant's house and real estate for the amount due the appellee for work done by him in the creation of said house. It is well settled by the decisions of this Court that the appellee's lien was not defeated by the alleged payment by the appellant to Norford of the full amount due or to become due to him on account of the erection of said house."

In the case of *Smith et al. vs. Newbaur*, 114 Ind. Reports, the first two sections of the syllabus are as follows:

"Constitutional Law. Due Process of Law. Mechanics' Lien. Statute Construed. Section 7257, R. S., 1894, providing that a mechanics' lien may be acquired by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material, is not unconstitutional as depriving the owner of his property without due process of law.

"Mechanics' Lien. For Materials Furnished to Contractor or Sub-contractor. A lien may be acquired for materials furnished for a building to either a contractor or sub-contractor, under Section 7255, R. S., 1894, placing them in the same category, so far as the right to acquire a lien is concerned."

The Court in its decision in this case says:

"The action was brought under the provisions of the mechanics' lien law of 1883 (Acts 1883), 140, as amended by the act of 1889 (Acts 1889, 257) and by the act of 1891 (Acts 1891, 28), Section 7255, R. S., 1894 (Section 1688, Ell. Supp.), and following sections.

"In support of the demurrer to the complaint, it is first contended that the mechanics' lien law of this State is invalid, as repugnant to Section 1, Art. 14, of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property, without due process of law. This contention is based upon the provisions of Section 3 of the mechanics' lien law (Section 7557, R. S., 1894; Section 1690, Ell. Supp.), which provides that any person wishing to acquire such a lien upon any property shall file in the recorder's office, 'at any time within sixty days after performing such labor or furnishing such materials,' notice of his intention to hold such lien.

"This notice, the only one provided for in the statute, is insufficient, say counsel, to secure that due process of law referred to by the Federal Constitution before the fixing of a lien upon the citizen's property. Under the law as enacted, counsel contend, any one may perform labor or furnish material in the construction of a building for a land owner, without such owner's knowledge or consent, and then secure a lien upon the land and building by notice filed after the work is done or materials furnished. It is said that the property owner should have notice at or before the doing of the work or the supplying of the materials, so that he may, if he wishes, prevent the doing of such work or the furnishing of such materials, and so keep his property free of the lien.

"It has often been held that every statute under which a contract is made enters into and forms a part of such contract. The appellants, in the contract for the erection of the dwelling house upon their property,

are therefore chargeable with knowledge of, and are bound by, all of the provisions of our mechanics' lien law then in force. By the terms of the agreement entered into the contractors were to furnish all materials necessary for the construction of the building. This was notice that such materials were to be furnished, and the law under which the contract was made was further notice that the building and ground upon which it was to be erected would be liable to a lien for the value of the materials so furnished. The only uncertainty left was whether those who should furnish the material would claim the lien therefor. That uncertainty is provided for in the statute, which requires that the notice of intention to hold the lien be filed in the recorder's office within sixty days. The owner has, consequently, ample means of protection, and is not liable to a lien without notice, nor to have his property taken without due process of law.

"It is intimated that the law hampers the freedom of action of the property owner; that he may desire to pay the contractor in advance, or to pay him by an exchange of other property for the erection of the building; and that it may be an inconvenience, or induce the contractor to bid higher for the work, if payment is to be delayed for sixty days after the work is done. These, however, are considerations that should be addressed to the Legislature, and not to the Courts. Besides, it is to be remembered that without the right to a lien on the property, laborers and material-men would, in many cases, have no security for their toil or the materials furnished by them. The laborer is worthy of his hire, and the seller of goods ought to be paid for them. As the law stands all parties are secured in their rights. The owner, by seeing that laborers and material-men are paid, or by keeping back for sixty days from the contractors sufficient to make such payment, is in no danger of having to pay twice for his building; while at the same time the man whose labor or material has gone into the building can look to the

building itself and to the ground upon which it stands for his security. The property owner enjoys the benefit of this work and of this material, and it is but just that he should be charged, for at least sixty days, with the responsibility of seeing that they are paid for."

On petition for rehearing the above case the decision was affirmed.

Code Wash. T., Sec. 1957, provides:

"That every person performing labor upon or furnishing material to be used in the construction of a building has a lien therefor, whether furnished at the instance of the owner or his agent, and that for the purpose of the act, every contractor, etc., shall be held to be the owners agent. By Sec. 1965 the owner may avoid a lien by posting a notice as therein directed.

"Held: That the material-man or laborer has a lien, notwithstanding payment to the contractor."

1 Wash. Rep., 609.

"Notice and affidavit having been furnished as required by law, by sub-contractor to owner, the latter is liable to former for amount named in the affidavit, regardless of state of accounts between owner and general contractor."

N. & W. Ry. Co. vs. Howison, 81 Va., 125.

"That which is given for the preservation or betterment of the common pledge, is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanics' lien laws stand on the same basis of natural justice. We are not prepared to say that a legislative act giving preference to such liens, over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States."

Provident Institute vs. Jersey City, 113 U. S., 516.

To the same effect see *Brooks vs. Railway Company,* 101 U. S., 446.

An Act of the District of Columbia, identical in principal with the provisions of Sec. 3184, has been construed and enforced by the Supreme Court of the United States in *Windsor vs. Caldwell,* 14 Howard, p. 434. We quote from the opinion of the Court upon pages 444 and 445:

> "The remaining bills of exception involve, in fact, but one prominent and important question, and the decision of it will dispose of this case:
>
> "The right to file a 'mechanics' lien' as it is usually denominated, is claimed by the plaintiff under the Act of Congress of March 2nd, 1833, entitled 'An Act to secure to mechanics and others, payment for labor done and materials furnished in the erection of buildings in the District of Columbia.' The first section of this act, defines the persons who shall be entitled to this peculiar security and remedy, as follows:
>
> "'All and every dwelling house, and other building, hereafter constructed and erected within the city of Washington, in the town of Alexandria, or in Georgetown, in the District of Columbia, shall be subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmaker, blacksmith, plasterer, and lumber merchant, or any other person or persons employed in furnishing materials for, or in erecting or constructing such house or other building, before any other lien which originated subsequent to the commencement of such house or other building. But if such dwelling house or other building, or any portion thereof, shall have been constructed under contract, or contracts, entered into by the owner thereof, or his or her agent, with any person or persons, no person who may have done work for such contractor, or contractors, or furnished materials to him, or on his order or authority, shall have or possess any lien on said house or other building, for work done, or materials so furnished, unless the person or persons employed by such contractor to do work on, or furnish materials for,

such building, shall within thirty days after being so employed, give notice in writing to the owner or owners of such building, or to his or their agent, that he or they are so employed to work or to furnish materials, and that they claim the benefit of the lien granted by the act.'

"Does a master-builder, undertaker, or contractor who undertakes, by contract with the owner to erect a building, or some part or portion thereof, on certain terms, come within the letter or spirit of this act, or within any of the classes enumerated, as entitled to this special remedy? Such persons have an opportunity, and are capable of obtaining their own securities. They do not labor as mechanics, but superintend work done by others. They are not tradesmen in lumber, or other materials for building, but employ others to furnish materials. If such contractor should be accident, be a carpenter, or an owner or vendor of lumber, yet he deals not with the owner in this capacity, but as an undertaker, who has covenanted for his own securities.

"The title to this act shows its policy and intention. It is to secure to 'mechanics and others, payment for labor done and materials found;' and the persons enumerated in the first section are, plainly, those mechanics and tradesmen whose personal labor or property have been incorporated into the building, and not the agents, supervisors, undertaker or contractors, who employed them. The act contemplates two conditions, under which such labor and materials may have been furnished: First, on the order of the owner, who may act without the intervention of any middleman, and thus become indebted directly to his mechanics and tradesmen. Or, secondly, when they have been furnished on the order of contractor or undertaker. In such cases, the mechanic or material-man, if he intends to look to the credit of the building, and not to that of the contractor with whom he deals, must give notice to the owner of the building, within thirty days, of his intention to claim this security. The contractor, though mentioned in the act, is not enumerated among those entitled to its

benefit. The aim and policy of this act is also obvious.. Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings or incumbers them with liens; and thus one portion of his creditors are paid at the expense of the labor and property of others. Or, the solvent owner, who builds by the agency of a contractor, or middleman, pays his price and receives his building without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection to those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated."

The Circuit Court of the United States, in *Puritan vs. The Hull of a New Ship,* 2nd Curtis, 416, has also construed and enforced upon the same ground, a statute of Maine quoted in said case, which contains the same provisions as Section 3184.

"That mechanics' lien laws are constitutional has been decided in a multitude of cases. They have been attacked as depriving persons of their property without due process of law, as being class legislation, as impairing the obligation of contracts, and as interfering with the right of trial by jury, and they have been declared by the Courts to be free from all these objections."

* * * * * * * * * * *

"But although these laws have in general been held constitutional, they sometimes contain unconstitutional provisions; so it will be necessary to examine the subject more in detail. The principal attack of these laws

on constitutional grounds has been directed towards the provisions giving liens to sub-contractors and material-men in the second degree, it being argued that, as there is no privity of contract between them and the owner, it was depriving him of his property without due process of law, to subject it to a lien for the contractor's debts to them. It was probably in order to meet this objection that same of the acts are declaring that the contractor shall be deemed the agent of the owner, thus bringing the owner and sub-contractor into privity of contract. But even without this provision, the acts giving these persons liens are not unconstitutional, since, when the owner enters into contract with the contractor, he does so with the conclusive knowledge of the law, and the provisions of the mechanics' lien law enter into and form a part of his contract. And it makes no difference that the statute allows sub-contractors to have liens aggregating more than the entire contract price named in the original contract, or that it allows them a lien in certain cases, even though the owner has paid the contractor in full."

Boisot on Mechanics' Liens—Sec. 22-23.

Chapter 191, Public Statutes of Massachusetts, provides:

"Section 1: Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration and repair of a building or structure upon real estate by virtue of an agreement with or by consent of the owner of such building or structure, or of any person having authority over or rightfully acting for such owner in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situate, to secure the payment of the debts so due to him, and the costs which may arise in enforcing such lien, except as is hereinafter provided."

"Section 2: When the agreement mentioned in the preceding section is for labor performed or furnished,

and for materials furnished upon an entire contract and for the entire price, a lien for the labor alone may be enforced, if it can be distinctly shown what such lien was worth, but in no case shall such lien be enforced, for a sum greater than the price agreed upon for the entire contract."

"Section 3: No lien shall attach for materials furnished unless the person furnishing the same before so doing gives notice in writing to the owner of the property to be affected by the lien, if such owner is not the purchaser of such material, that he intends to claim such lien."

"Section 4: The owner of a building or structure in the process of erection or of being altered or repaired, if he is the person other than the party by whom or in whose behalf the contract for labor and material has been made, may prevent the attaching of a lien for labor not at the time performed, or for materials not then furnished, by giving notice in writing to the person performing or furnishing such labor or furnishing such materials, that he will not be responsible therefor."

Under this Statute it has been held:

"It is no defense to a petition to enforce a mechanics' lien, under public Statute 191, for labor performed for a contractor upon the respondent's house, that the material furnished by the contractor was not of the quality called for by the contract and the petitioner's work, through no fault of his, was a damage to the house. * * *

"Our statute gives an immediate lien to any one who has performed labor in the repair of a building by the consent of its owner. Even if he is employed by a contractor, the laborers lien is not by way of subrogation, and does not depend upon the terms of the contract or the state of the account between his employer and the owner of the land."

Bowen vs. Phinney, 162 Mass., 593.

"Such liens in favor of sub-contractors would equally bind the estate by consent of the owner; because such a contract, by force of the existing law, when it was made, of which the owner is presumed to be cognizant, gives his irrevocable power to his contractor, to charge and bind his estate; and when such power is executed by the actual making of such sub-contract for labor it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

Donahy vs. Clapp, 12 Cush. (Mass.) Reports, 440.

The Missouri Statute is:

"Section 6750: Every mechanic, or any person, who shall do or perform any work or labor upon, or furnish any material, fixture, engine, boiler or machinery for any building erected or improvements upon land or for repairing the same under and by virtue of any contract with the owner or proprietor thereof, or his agency, trustee, contractor, or sub-contractor, upon complying with the provisions of this article, shall have a lien for his work or labor done, or materials, fixtures, engines, boilers, or machinery furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner or proprietor upon which the same are situate to the extent of one acre."

The Supreme Court, in *Henry & Coatsworth Co. vs. Evans*, 97 Mo., 47, say:

"The Mechanics' Lien Law, Rev. Stat. 1879, Sec. 3172 *et seq.*, gives a lien to sub-contractors for materials furnished by them to the contractor and used in the construction of the building, notwithstanding the full contract price of the building has been paid in good faith by the owner to the contractor, and such lien is not limited to the amount fixed by the contract of the owner, with the original contractors."

* * * * * * * * * * *

"It has already been decided that in no event can a sub-contractor assert a lien against the property for a

greater amount than the reasonable market value of the materials he furnished toward the erection of the buildings or improvements. 74 Mo., 37; 63 Mo., 295; but there is nothing in this or in any other section expressly limiting the aggregate liens to the amount which the owner agreed to pay to the original contractor for the completed work." * * *

"In the matter before us, the Mechanics' Lien Law is assumed to be in contemplation of all parties making a building contract. There is, hence, no injustice in treating them as having accepted the consequences fixed by that law."

REVIEW OF THE CASES CITED BY COUNCIL FOR PETITIONER AS SUSTAINING THE DECISION OF THE SUPREME COURT OF OHIO.

Counsel for appellant herein cite in support of the conclusion reached by the Ohio Court:

Sprey Lumber Co. vs. Sault St. Marie Savings Bank, 77 Mich., 199;
Waters s. Wolf, 162 Pa. St., 153;
Myer vs. Burlandi, 39 Minn., 438;
Henry vs. Rice, 18 Mo. Ap., 512;
Renton vs. Conley, 49 Cal., 189.

In *Sprey Lumber Company vs. Sault St. Marie Savings* Bank, no authorities are cited by the Court in support of its position, nor is there any pretense that the statute expressly violated any particular provision of the Michigan Constitution. So far as we can judge from the opinion, the sole reason for the decision was, that the Court did not like the law.

The decision in this case is materially modified in principle by the subsequent case of *Smalley vs. Gearing*, 121 Mich., 190.

Waters vs. Wolf, 162 Pa. St., 153, is fully discussed by Judge LURTON in his opinion, 86 Fed. Rep., 372.

We also refer the Court to the dissenting opinion of Judge MITCHELL in that case as being more in harmony with the

former decisions in Pennsylvania, and with the authority of other Courts upon this subject. Among other things, Judge MITCHELL says:

> "It is the province of the Legislature to declare the public policy of the State, including what contracts shall be lawful, in what form they shall be made, and what shall be their effect. From the earliest days of the republic it has done this without question, whenever the contract itself or its collateral effect touches matters of public interest or policy, of which the Legislature is the exclusive judge. Thus under statutes all leases for more than three years are at will only unless in writing no matter how explicitly the parties contract for a long term. Under statute, a loan of money is only a loan at six per cent., no matter how plainly the parties express their intent that it shall be at a higher rate. Under statute, as well as under the common law, partnership involves certain liabilities to third parties no matter how strictly the partners may contract among themselves to avoid this result. And the Courts with the least hesitation enforce the liability of a principal for the acts of his agent within the apparent scope of his authority, no matter how contrary to his orders in fact. But it is unecessary to multiply examples as the greatest example of all is the mechanics lien itself. It has no other basis than the incorporation of liability for work and materials into the contract for building, by legislative mandate, without the slightest regard to the actual intentions of the parties. No one who contracts for having a house built intends apart from statutory compulsion to give a sub-contractor or material-man a claim against him or his land any more than he contemplates when he orders a suit of clothes a liability to the merchant from whom the tailor buys the cloth, or to the workman who sews it together. The result follows from the statute alone, because the Legislature has enacted that a contract to build a house shall carry with it an authority to the contractor to pleadge not only the

house, but the land on which it is to be built, for payment of the labor and materials sold on the credit of it, even though the materials do not in fact go into it. It is the creation of an agency by the Legislature as a matter of public policy without regard to the will of the owner."

It will be found upon examination, that *Henry vs. Rice*, 18 Mo. Appeals, 512, was the decision of an inferior Court, and was distinctly held by the Supreme Court of Missouri in *Henry & Coatsworth Co. vs. Evans*, 97 Mo., 47, referred to above, not to be the law of Missouri.

Renton vs. Conley, 49 Cal., 189, does not hold the statute of California, which is similar to that of Ohio, to be unconstitutional, but following the decision of former cases, merely construes the law in a certain way. The decision of the Supreme Court of California in 43 Cal., 514, to the effect that a law similar to that in Ohio was constitutional in that State, is still unreversed and unmodified.

In *Myer vs. Burlandi*, 39 Minn., 438, the Court, while holding that the Minnesota Act of 1887, was void as a whole, by reason of certain unconstitutional provisions therein, also held that a former Act of Minnesota passed in 1878, Chap. 90, Minnesota Laws, remained in full force and was valid. The provisions of this former Act of 1878, were identical, as nearly as may be, with those of Sec. 3184, under consideration, and have been held by the Supreme Court of Minnesota to be constitutional in *Laird vs. Noonan*, 32 Minn., 358; *Bardwell vs. Mann*, 48 Minn., 285; *Burns vs. Sewell*, 48 Minn., 423; *Wheaton vs. Burg*, 50 Minn., 525.

The case of *Hampson et al. vs. The State of Ohio*, 8 Ohio, page 314, cited and commented upon by complainant's counsel, will be found upon examination to have no application to the principles involved in this controversy. It was a suit of equity, brought under a special statute authorizing the suit, and the hypothetical case proposed by the Court was based solely upon the conditions of that suit, and not with reference to any lien statute, or other statute containing provisions similar to the one under consideration.

The decision in *Young vs. The Lion Hardware Company* announces a new and momentous principle in the interpretation of constitutional powers. It was, in effect, and indeed in words, that of the propriety of legislation, the Court, equally with the Legislature, is to be the judge. Before this announcement it was considered axiomatic that within its powers the legislature alone is the judge of the policy or prudence of legislation. No man ever more forcibly announced and enforced this doctrine than did Judge SWAN in *Ex parte Bushnell*, 9th Ohio State, 77. No man ever more forcibly predicted than did he, the evils necessarily consequent upon any attempt on the part of the judiciary to interefere with the rightful exercise of legislative powers.

> "It is not a part of the functions of a Court to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions."
>
> *Powell vs. Pennsylvania*, 127 U. S., 685.

The Ohio Court does, by its opinion, attempt "to conduct investigation of fact and enter into the question of public policy merely." It does, in effect, frustrate the legislative will embodied in the statute. There is no assertion in this decision that the law in question violates any specific provision of the constitution. There is no finding that the obligation of any contract is impaired, nor that any citizen is deprived of his property without due process of law. The sole ground of the decision is, that the Court, as well as the General Assembly, is to judge whether or not legislation imposing any restraint upon the right of contract, is for the public welfare, protection and benefit. The logical result of this decision is, that the Court is the sole judge as to whether such legislation is for the public welfare, protection and benefit, for the Court is the final judge. If it can determine, as it did in this case, that liens provided by statute are not for the public welfare and benefit, it can equally determine that interest laws, homestead laws, exemption laws, and all matters of like character are or

are not for the public welfare, protection and benefit. It attempts in this decision to evade the settled rule that statutes become a part of contracts thereafter entered into by holding that this only applied to "valid" statutes, using "valid" in the sense of "wise" or "proper." But this brings us back to the same question: Who is to determine as to the validity of the statutes in that sense? The Court or the Legislature, within its legitimate powers? If the Court, then the Court legislates as effectually as if its seal were affixed to the statute.

In conclusion we might say, that the acquiescence almost without exception, of both the judicial and legislative powers of all the States and of the United States in the right, within its discretion, of the Legislature to create liens known as mechanics' liens, and to regulate the method and manner of enforcing them, and to prescribe the rights of the various parties thereto, not only justifies this Court in upholding the constitutionality of the act in question, but forbids its doing otherwise. If the principle be wrong, then in the language of the Supreme Court of Massachusetts, *Roders vs. Goodwin*, 2 Mass., 475: "We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law."

Respectfully submitted,

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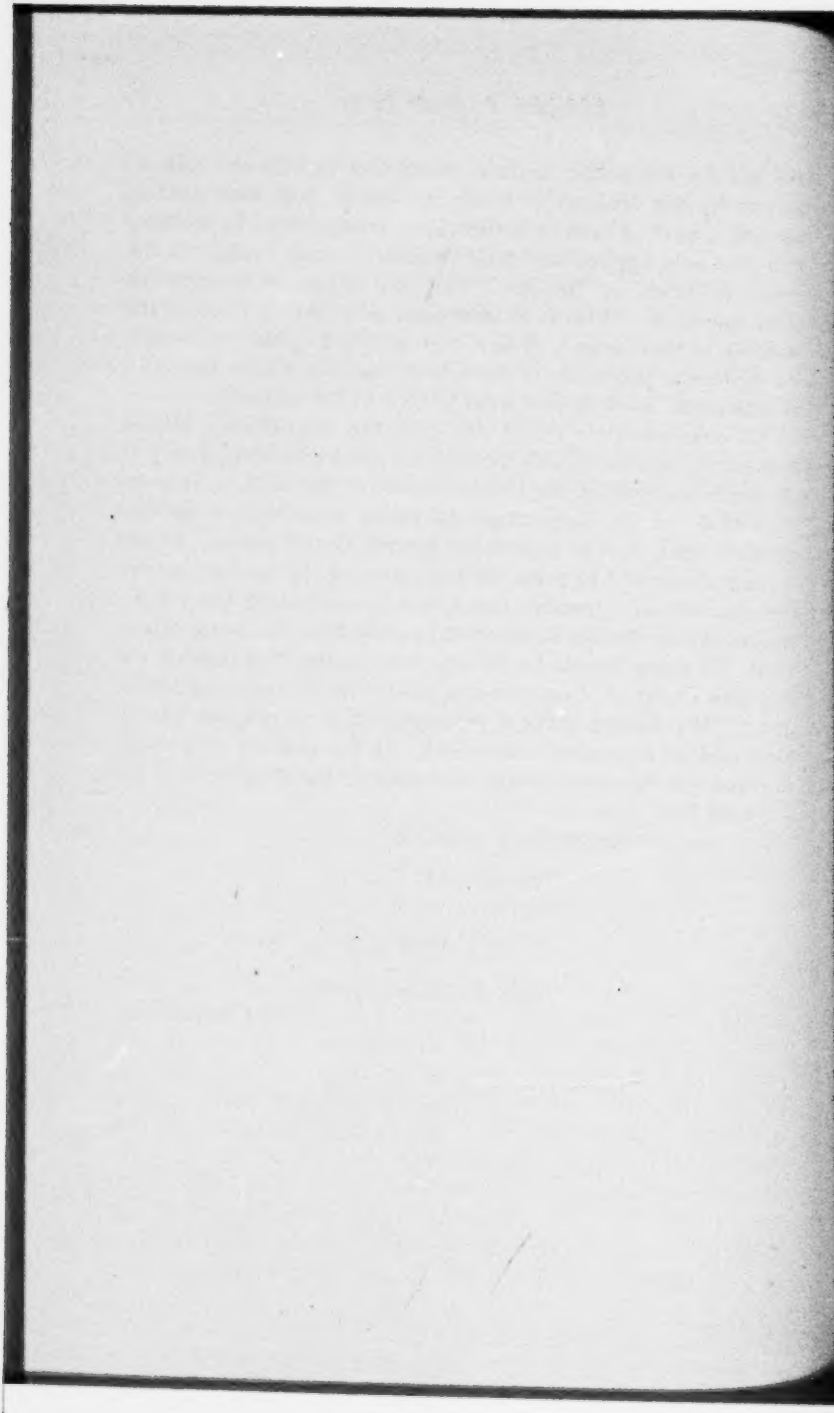

(18,745)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 165.

Office Supreme Court U. S.
FILED
JAN 18 1904
JAMES H. McKENNEY,
Clerk.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY,

PETITIONER,

vs.

BENJAMIN F. JONES ET AL.,

RESPONDENTS.

BRIEF FOR RESPONDENTS.

GEO. K. NASH AND
LOUIS G. ADDISON,
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RESPONDENTS.

BRIEF FOR RESPONDENTS.

The controversy in this cause presents but two questions:

1. On the record of this case is this court bound to follow the decision of the Supreme Court of Ohio declaring the statute in question unconstitutional?

2. Does that statute contravene any provision of the Constitution of Ohio?

Our contention is that both these questions should be emphatically answered in the negative.

Inasmuch as we claim that the respondents made the contract and furnished materials as required thereby on the faith of the statute, and before it had been overthrown by the Supreme Court of Ohio, and inasmuch as counsel for petitioner intimates that materials under respondents' contract were furnished while the statute was under fire, and at least weakened by the decision of a Circuit Court of that state, we consider it well to array certain facts in their chronological order at this point.

1. The law in question was passed April, 1894.

2. The contract for building the hotel between the petitioner and McClain, the principal contractor, was made October 10, 1894. (Brief for Petitioner, p. 4.)

3. The contract between respondents and McClain, December 13, 1894. (Brief for Petitioner, p. 4.)

4. The last item of material was furnished under the latter contract January 28, 1896. (Record, p. 10.)

(All the material under this contract was furnished during the year 1895, except two items aggregating $350.49.)

5. Affidavit for lien under the statute filed April 21, 1896. (Brief for Petitioner, p. 5.)

6. Decision of Circuit Court of Putnam county against the law, November 15, 1895.

7. Decision of the Circuit Court of Clark county, sustaining the law, December 14, 1895.

(The dates of these decisions of the Circuit Courts have been ascertained from the records filed in the Supreme Court of Ohio, and will not be disputed.)

8. Decision of the Supreme Court of Ohio, overthrowing the law, December 8, 1896. (55 Ohio State Rep., 423.)

Were we at liberty to indulge the absurd theory that the respondents were presumed to have notice of the pendency of the actions, and the decisions of these inferior courts construing the statute in question, then instead of being put upon their guard against furnishing what little balance of materials there was remaining to be fur-

nished under their contract, they would have found that one of these courts had declared against the law, and the other of equal authority in its favor. The latter decision was the one favorable to the law, and it is to be presumed that it had before it the conclusion reached by the other court, its reasons therefor, and that those reasons were pronounced unsound and the conclusion wrong. It is unnecessary to dwell further upon this point.

It is suggested by the other side, page 61 of the brief that—

> "There is no showing that their (Jones' and Laughlin's) claims could not be collected by law from McClain without relying upon the lien."

Learned counsel have overlooked the averment of the amended bill where it is expressly alleged, in the sixth paragraph:

> "that on the first day of August, 1896, the said William J. McClain made and filed in the Probate Court of Franklin County, Ohio, a deed of assignment for the benefit of his creditors to F. Burt Milligan; that said William J. McClain is wholly insolvent and unable to pay the claims of your said orators." (Record, p. 5.)

The answer to the amended bill is found on pages 12-14 of the record, and there is no denial of this allegation, either general or specific.

I.

This Court not bound by the decision of the Ohio Supreme Court.

Taking up the two questions here presented in the order stated, we maintain that the decision of the Supreme Court of Ohio, above referred to, is not binding upon the United States Courts for the following reasons:

1. The cause of action set out in the amended bill accrued before the decision of the Supreme Court of Ohio was rendered or announced.

2. The former decisions of the Supreme Court of Ohio upon similar contracts and liens, are in conflict with that decision, and the cause of action accrued before such former decisions were reversed by the holding in *Young vs. The Lion Hardware Company.*

3. The constitutional question is one of general constitutional law, not peculiarly applicable to the Constitution of the State of Ohio, but equally applicable to any and all Constitutions, including State and Federal.

4. The question is one of general jurisprudence and commercial law.

I.

Respondents were non-residents of the State of Ohio when they examined the statutes and ascertained their rights before making their contract and furnishing the labor and material, and had the right to presume that the statute was constitutional, and that their rights would be protected thereunder, and under these circumstances, we think that the decisions of this Court have clearly established that this Court will act independently of the Ohio Court, and while giving due weight to its decision, will still of itself and independently of the Ohio Court, decide whether or not said law was in fact unconstitutional.

In *Burgess vs. Seligman,* 107 U. S., 20, Justice Bradley, speaking for the Court, on page 33 says:

> "When contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued."

And after stating that the Courts of the United States will endeavor to avoid any unseemly conflict with the well-considered decisions of the State Court, he says:

"As, however, the very object of giving to the national Courts jurisdiction to administer the laws of the States in controversies between citizens of different states, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In *Anderson vs. Santa Anna Tp.*, 116 U. S., 356, Justice Harlan, on page 362, in delivering the opinion of the Court, says:

"In *Burgess vs. Seligman*, 107 U. S., 20, 33, the Court had occasion to re-examine all its prior adjudications concerning the obligation of the Federal Courts, to follow the decisions of the State Courts upon questions of local law. Mr. Justice Bradley, speaking for the whole Court, after observing that the Federal Courts had an independent jurisdiction in the administration of state laws co-ordinate with and not subordinate to that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of these laws, said: 'So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases for the sake of harmony and to avoid confusion, the Federal Courts will lean to an agreement of views with the State Courts if the question seems to them balanced with doubt.' Any other rule, it was further said, would defeat 'the very object of giving to the National Courts jurisdiction to administer the laws of the states in controversies between citizens of different states.'"

Judge Lurton, in delivering the opinion of the Circuit Court of Appeals below, reported 86 Fed., 370, at page 372, referring to the case of *Young vs. The Lion Hardware Company*, 55 Ohio State, 423.

"Does that decision furnish a rule of decision which is obligatory upon Courts of the United States? When a citizen of one state enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by a Court of the United States. That right does not by any means involve the application of a different rule of de-

cision, for the judiciary act requires that the laws of the several states shall be regarded as rules of decision, in trials at common law, where they apply. But even the decision of the highest courts of the state by whose law the rights of the parties are to be ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon courts of the United States. The question is, when do they apply? In the past, this inquiry has involved no little friction between the Courts of the Union and those of the states. But the final arbiter of all such constitutional questions is the Supreme Court of the United States. So far as the inquiry is pertinent to the decision which must be here made, that Court has in an authoritative way decided:

"1. That such decisions are not necessarily obligatory upon Courts of the United States where they effect contracts which were valid under the Constitution and laws of the state as interpreted and enforced by its highest judicial tribunals at the time they were entered upon.

Rowan vs. Runnels, 5 How., 134.
Ohio Life and Trust Co. vs. Debolt, 16 How., 432.
Gelpcke vs. The City of Dubuque, 1 Wall., 175.
Olcott vs. The Supervisors, 16 Wall., 678.
Taylor vs. Ypsilanti, 105 U. S., 60.
Douglass vs. County of Pike, 101 U. S., 677.
Louisville Trust Co. vs. Cincinnati, 47 U. S. pp. 36, 46.

"In *Rowan vs. Runnels*, supra, Chief Justice Taney said: 'Undoubtedly this court will always feel itself bound to respect the decisions of the State Courts, and from the time they were made regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this Court, were lawfully made.'

"In *Douglass vs. County of Pike*, cited above, the Court, after reviewing the preceding cases, decided by that Court, said: 'The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes

the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'

"2. Neither are such decisions obligatory upon Courts of the United States when thereby the validity of contracts between a citizen of the state and a citizen of another state is affected which were executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question.

Burgess vs. Seligman, 107 U. S., 20-33.
Pleasant Township vs. Aetna L. Ins. Co., 138 U. S., 67-72.
Louisville Trust Co. vs. Cincinnati, 47 U. S. A., pp. 36-47."

We call especial attention to the opinion of Judge Lurton, in discussing this proposition of law, on page 373, of 86 Fed.

The same rule of law is recognized in *Miller vs. Ammon*, 145 U. S., 421, in the opinion of the court on page 423, where

Burgess vs. Seligman, 107 U. S., 20;
Carroll County vs. Smith, 111 U. S., 556;
Gibson vs. Lyon, 115 U. S., 439, and
Anderson vs. Santa Anna Township, 116 U. S., 356,

are cited as instances in which this court did not consider itself bound by the decisions of the state courts.

In *Burges vs. Seligman*, supra, Justice Bradley, in delivering the opinion of the court, said:

"We do not consider ourselves bound to follow the decision of the state courts in this case."

Pleasant Township vs. Aetna Life Insurance Co., 138 U. S. 67, was a decision in which this court refused to follow the construction placed upon the law by the state court, although after an independent examination they reached the same conclusion. That was a case in which the constitutionality of the Ohio statute was brought in question; and the Supreme Court of Ohio decided the law was repugnant to the Constitution of Ohio in *Wyscaver vs. Atkinson*, 37 O. S. 80. After the bonds had been issued, in a suit upon certain of these bonds in the case above referred to in this court, Justice Brewer, on page 72, in delivering the opinion of the court, said:

"We are not concluded by that determination. In matters of contract especially, the right of citizens of different states to litigate in federal courts of the various states is a right to demand the independent judgments of those courts. The settled law in that respect is well stated in the case of *Burgess vs. Seligman*, 107 U. S., 20, 33."

See also *American and English Encyclopedia of Law*, Volume 27, page 600, and the notes and cases cited in the notes.

Both the Circuit Court and the Circuit Court of Appeals recognized and followed this rule of law, and it seems to us there can be no dispute about the correctness of this proposition.

2

The decisions of the Supreme Court of Ohio, prior to the one announced in *Young vs. The Lion Hardware Company*, in cases involving the same constitutional questions, are certainly in conflict with that opinion, and under the earlier decisions of that Court, we believe that the law now in question is constitutional, and that the decision of *Young vs. The Lion Hardware Company* is a departure from the settled construction as theretofore announced by that Court.

If we are correct in this conclusion, then this is an additional ground why this Court should consider this question independently of the State Court.

Ohio Life Insurance & Trust Company vs. Debolt, 16 How., 432.

Douglass vs. Pike County, 101 U. S., 677.

It is true that the Supreme Court of Ohio had not passed upon this section of the mechanics' lien law, as it had only been enacted in April, 1894, but they had recognized other laws as being constitutional which we insist were open to the same objection as the act now in question.

The cases of—

Railway Company vs. Cronan, 38 O. S. 122 and
Railway Company vs. McCoy, 42 O. S. 251,

were actions to enforce liens in favor of those contributing labor or material to the construction of the railway.

In *Railway Company vs. Cronan,* supra, Longworth, Judge, in delivering the opinion of the Court on page 124, says,—

> "The cause of action upon which suit was originally brought was created by the act of March 31, 1874, (71 Ohio Laws, 51), entitled 'an act to secure pay to persons performing labor and furnishing materials in constructing railroads,' and the solution of the question raised in this Court depends upon the proper construction of its terms."

It is true the constitutionality of the enactment was not mooted, although very able and distinguished counsel represented the railroad company which was opposed to the sustaining of the lien.

The same was true in *Railway Company vs. McCoy,* supra.

As well stated by other counsel for Respondents:

> "The power of the legislature to regulate contracts and to point out the mode of their discharge was recognized as early as the case of *Smith vs. Parsons,* 1 Ohio, 236."

Judge Burnet, in delivering the opinion of the Court, on page 239, says,—

> "It is admitted that the states have not given up the entire power of legislating on the subject of contracts.... The legislature has a right by law to regulate contracts, to determine their effect and point out the mode of their discharge. These laws are applied to all subsequent engagements and fix the rights of the parties at the very instant the contract is closed, so that the contract in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continued what it was at its commencement; and it is more correct to say that the law has in part made the contract than that it has changed it."

This language is cited with approval by the Supreme Court in the opinion of the Court delivered by Judge Williams, in *Weil vs. State,* 46 O. S. 450.

It is true that in these cases constitutional questions as affecting mechanics' liens were not raised, but the principle of law relied upon by the petitioner, in this case, as rendering the act under consideration unconstitutional, was certainly passed on in these cases, and adversely to the petitioner, and for this reason this Court is not bound by the decision of the Supreme Court in *Young vs. The Lion Hardware Company.*

3 and 4.

An examination of the decision of the Supreme Court in the case of *Young vs. The Lion Hardware Company,* will disclose that the decision is based upon general constitutional law, and is not applied to any particular or peculiar provision of the Ohio Constitution different from the Constitution of any other state or the United States. It is based upon the broad ground that it abridges the liberty of the citizen, and interferes with his property rights.

Judge Lurton, in delivering the opinion of the Court below, clearly points out this fact, and quotes copiously from the decision of the Ohio Supreme Court to show the correctness of his conclusion. On pp. 376, 377 in his opinion, 86 Fed., he says:—

> "We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The 'rights' supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government and like declarations are to be found in all or most of our state Constitutions. The question is, therefore, one of general law, having as much reference to the Constitution of any other state as to that of Ohio."
>
> "In the case of *Whiting vs. Fond du Lac County,* 25 Wis. 188, it was held that under the Constitution of Wisconsin, a tax could not be constitutionally laid in aid of the building of a railroad. The Supreme Court of the United States refused to follow this as a decision obligatory upon it in a case involving the validity of an act of the Wisconsin legislature authorizing a tax in aid of a railroad.
>
> "Upon the question as to whether the decision was one of local or general law the Court, in *Olcott vs. The Supervisors,* 16 Wall, 678, 690, said:

> " 'This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional law. It is a question of general law. It has as much reference to the constitution of any other state as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single state tribunal, but in general principles common to all Courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state can conclusively determine for us. This consideration alone satisfies our minds that *Whiting vs. Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect.' "

The decision of the Court was upon a part of the constitution common to all constitutions, and its decision had reference as much to the constitution of one state as to another state, and attempted to prescribe a rule of general constitutional construction, applicable to the constitution of any other state or even to the Constitution of the United States. This is a question of general jurisprudence, and the Court must decide it independently, and although mechanics' liens are statutory, yet being a part of the statute law of almost every state and territory, and recognized by congress as a part of the statute law of the District of Columbia, the law applicable to them may be considered in the same light as the principle regulating general commercial law, and therefore, in cases of proper jurisdiction, the subject of the independent interpretation and construction of the Federal Courts regardless of local decision, and local decisions are not binding where they affect or construe only the general powers of the legislature over the subject matter, and upon these grounds, this Court should examine this act and reach its own independent conclusion as to its validity, and we insist that any one of the foregoing reasons is sufficient ground for that examination and decision.

Perhaps the latest expression of this court on the question now before us is found in the case of *Board of Comm'rs of Stanly Co. v. Coler & Co.*, 190 U. S., 437. The second syllabus of that case is as follows:

> "Federal courts, in determining the validity, in the hands of bona fide purchasers, of county bonds issued in aid of railroad construction under the authority of N. C. Code, Sections 1996-1999, are not bound by the construction given such statute by a decision of the highest state court subsequent to such purchase, but will exercise an independent judgment as to the meaning."

Quoting from the opinion by Mr. Justice McKenna, the following language is to the point:

> "To this case the respondents oppose the contentions that its (the Supreme Court of North Carolina's) interpretation of the Constitution and Code sections is (1) incorrect, and this involves the further contention that we may exercise an independent judgment of them; * * * Pretermitting consideration of the other conditions for a time, we are brought to the contention of the respondents, that we are not constrained to follow the opinion of the Supreme Court of North Carolina.
>
> "The general rule undoubtedly is that we accept the interpretation put by the state courts upon the state constitutions and statutes. There are exceptions to the rule, and the case at bar presents one of them. The rule and its exceptions are stated in *Burgess v. Seligman*, 107 U.S., 20, 27, L. Ed. 359, 2 Sup. Ct. Rep. 10, and the many cases by which the rule was sustained are collected in a note on page thirty of the opinion. In that case a statute of Missouri provided that the stockholders of a corporation at its dissolution were liable for its debts. It also provided that no person holding stock as executor, etc., or holding stock as collateral security, should be personally liable, but the persons who pledged the stock should be considered as holding the same, and be liable. The Supreme Court of Missouri held that the exemption of the statute did not extend to persons receiving from the corporation itself stock as collateral security. This court decided to the contrary, and held that it was not bound to follow the decision of the Supreme Court of the state. The question presented was regarded as one of commercial law and general jurisprudence, and the right to exercise our own judgment was asserted. It was said that state decisions were to be followed when they had become a rule of

property, and that 'this is specially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued.' "

We desire now to call attention to the act itself, and to the arguments advanced by counsel for the petitioner, and the grounds upon which they claim this law is unconstitutional, as well as the authorities and decisions upholding and enforcing such legislation.

II.

Was the law in question unconstitutional?

As we understand the claim of counsel for the petitioner, when reduced to its final analysis, their objection to the law is based upon the following grounds,—

1st. That it deprives the owner of property of the right of acquiring, possessing and protecting his property and contracting in relation thereto.

2nd. It impaires the obligation of contract.

3rd. It deprives the owner of property without due process of law.

4th. It is class legislation.

The first three propositons may be discussed together, as the decisions applicable to each are so closely interwoven, that it is difficult to point out and classify the decisions on each particular subject,

without overlapping into the other, and the same constitutional principle covers all three instances.

The lien asserted and sought to be enforced is for labor and material furnished after the passage of the act of April 13th, '94, and the labor and material were all furnished and the contract completed and the lien recorded and established long prior to the decision of the Supreme Court of Ohio in *Young vs. The Lion Hardware Company* holding the act to be unconstitutional.

The contract having been made, executed and performed, during the time this law stood upon the statute books of the State of Ohio, as the law of Ohio, the law must therefore be considered as forming a part of the contract, and it does not deprive the petitioner of its property, without due process of law, nor does it impair the obligation of its contract.

As is well stated by the Supreme Court of Ohio in *Smith vs. Parsons*, 1 Ohio, supra,—the contract itself receives an impress from the law, and the law has in part made the contract.

Judge Burnet, in delivering the opinion of the Court, says,—

> "These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract, than that it has changed it."

And on page 238, he says,—

> "Although a state legislature can not pass laws impairing contracts, yet they may regulate them, prescribe their form, their effect and the mode of their discharge, *and every contract is supposed to be made with reference to those laws.*"

And on page 239 he clearly points out the reason upon which this principle of law is based.

In *Weil vs. The State*, 46 O. S. 450, Judge Williams in delivering the opinion of the Court, after quoting from the language of Judge Burnet, already pointed out, on page 452 says,—

"Persons contracting after the passage of the statute, could not know the law was one impairing the obligation of contracts in the sense of the constitution, but as an act regulating future contracts and defining their effect."

And on page 453, in quoting from Judge Burnet in the same case, he says,—

"Instead of determining the validity of the statute by reference to the alleged intention of the parties to the contract, we must fix the *legal intent of the parties, as well as the nature and extent of the obligation of the contract by reference to the statute.*" And again,—"Contracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, *as if that provision had been inserted in, and formed part of the contract.*"

In *Smith et al. vs. Newbauer et al.*, 144 Ind., 95, the Court says in the first paragraph of the syllabus,—

"Section 7257 R. S., 1894, providing that a mechanics' lien may be acquired, by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material, is not unconstitutional as depriving the owner of his property without due process of law."

This Court will observe that the law under consideration was very similar to the Ohio law, and it was certainly open to all the objections that can be raised on constitutional grounds against the Ohio law. The same argument was made in that case, as is made by the petitioners in the case at bar. They vigorously asserted that that law prevented the owner from paying cash for his building, or paying for it in advance or paying for it with other property, and made all the other questions that are argued by counsel for the petitioners in the case now before this Court.

Judge Howard, in delivering the opinion of the Court, on page 96, says,—

"In support of the demurrer to the complaint, it is first contended that the mechanics' lien law in this state is invalid, as repugnant to Section 1, Article XIV of the Constitution of the United States, which provides that no state shall deprive any

person of life, liberty or property, without due process of law." * * *

In discussing this question farther on in the opinion, he says,—

"It has often been held that every statute under which a contract is made, enters into and forms a part of such contract. The appellants, in the contract for the erection of the dwelling house upon their property, are therefore chargeable with knowledge of, and are bound by all the provisions of our mechanics' lien laws then in force. By the terms of the agreement entered into, the contractors were to furnish all materials necessary for the construction of the building. This was notice that such materials were to be furnished; and the law, under which the contract was made, was further notice that the building and the ground upon which it was to be erected, would be liable to a lien for the value of the materials so furnished."

On page 98, he says,—

"It is intimated that the law hampers the freedom of action of the property owner; that he may desire to pay the contractor in advance, or to pay him by an exchange of other property for the erection of the building; and that it may be an inconvenience, or induce the contractor to bid higher for the work, if payment is to be delayed for sixty days after the work is done. *These, however, are considerations that should be addressed to the legislature, and not to the courts.* Besides, it is to be remembered that without the right to a lien on the property, laborers and material men would, in many cases, have no security for their toil or the materials furnished by them. The laborer is worthy of his hire, and the seller of goods ought to be paid for them. As the law stands, all parties are secured in their rights. The owner, by seeing that laborers and material men are paid, or by keeping back for sixty days from the contractor, sufficient to make such payment, is in no danger of having to pay twice for his building; while at the same time, the man whose labor and material has gone into the building, can look to the building itself, and to the ground upon which it stands, for his security. The property owner enjoys the benefit of this work and of this material, and it is but just that he should be charged, for at least sixty days, with the responsibility of seeing that they are paid for."

In this case, there was a petition for a rehearing, and after a careful and full consideration, the original decision of the Court was sustained and upheld.

Judge Howard, in delivering the opinion of the Court, on the petition for rehearing, on page 102, says,—

> "We were of opinion that the validity of the mechanics' lien law of this state was fully considered and affirmed in the original opinion. That law does not provide for depriving an owner of his property without his consent. On the contrary, the law which enters into and forms a part of his building contract, is notice to him that his land, and the building to be erected thereon, are liable to a lien for the value of the labor and materials which may enter into its construction. He voluntarily contracts for this labor and material with notice from the statute of the inchoate lien thereby authorized. The statute, moreover, in the interest of the owner prevents the fixing of the lien unless notice be given him within sixty days from the time of the furnishing of the labor and material. His property is therefore not taken without due process of law. See *Colter vs. Frese*, 45 Ind., 96."

The provision for obtaining the lien under the Indiana statute was the same as that in the Ohio statute, to-wit, by filing a sworn statement with the recorder, setting out the labor and material as required by the statute, the only difference being that in Ohio, he had 120 days to do this, while in Indiana he had 60.

Judge Howard, in this opinion, on pages 102-3, cites Section 33-a of Phillips on Mechanics' Liens (3d Ed.), with approval. It is there held that the owner may by contract or indemnity bond, protect himself against double payment for such labor and material.

Citing,—

> *Mallory vs. LaCrosse Abbatoir Co.*, 80 Wis. 170, and also distinguishes the case of *Sprey Lumber Company vs. Savings Bank Company*, 77 Mich., 199.

At the bottom of page 103 he says,—

> "The statute in the case at bar, however, is one with reference to which appellants entered into their building contract, and according to which they consented to the lien that followed. Such consent included an agreement that those who should furnish to the contractors and subcontractors, the material which should go into the building, might have sixty days after furnishing the same, within which to give notice of their

intention to hold such lien. We have no doubt of the constitutionality of the law."

In *Colter vs. Frese*, 45 Ind. 96, cited by Judge Howard in the opinion above quoted, the validity of an act such as the one now in question, was ably sustained and upheld by Judge Warren, who delivered the unanimous opinion of the Court.

The opinion of the Circuit Court of Appeals, as delivered by Judge Lurton, reported in 86 Fed. 370, contains such a full, complete and exhaustive discussion of this whole question, that it hardly seems necessary to cite further authority on this subject. We have endeavored, however, to call attention to a few recent decisions that were not mentioned in that opinion, some of which have been made since this case was decided in the Court below.

In *Title Guarantee & Trust Company vs. Wrenn*, 56 Pac. Rep. 271, the Supreme Court of Oregon say in the first paragraph of the syllabus,—

> "Code Section 3672, providing that where improvements are constructed on lands with the owner's knowledge, the interest of the owner shall be subject to lien unless within three days after notice of the construction he gives notice, in writing, posted on the land, that he will not be responsible for the improvement, is not unconstitutional, on the ground that it permits a lien to attach without the consent of the owner, since it only prescribed what shall be evidence of the owner's consent."

The provision of the Oregon statute was challenged in that case, on the ground that it was unconstitutional, because it permitted the contractor or subcontractor to obtain a lien without the authority or consent of the owner.

The Court say in delivering the opinion,—

> "Similar provisions of mechanics' lien laws have been sustained and enforced even in the state to whose reports we are referred for counsel's leading authority. See
>
> *Wheaton vs. Berg*, 50 Minn., 525.
> *Lumber Company vs. Newkirk*, 80 Cal. 275
>
> " * * * So that we conclude this section is not open to the constitutional objection urged."

In *Albright vs. Smith et al.*, 3 S. Dak. 631, the Court say in the syllabus,—

"By Section 5470 Comp. Laws, a subcontractor is entitled to a lien as defined in the preceding section, for labor done or material furnished, if within sixty days after the doing of the labor or the furnishing of material he files with the clerk of the Circuit Court of the proper county or subdivision the account of the demand due him as therein provided."

"2. Such lien within the limit of the contract price between owner and contractor, may be enforced irrespective of the state of the account between the owner and the contractor, or the amount due or unpaid upon such contract."

"3. So construed, said Section 5470 is not unconstitutional, as impairing the obligation of the contract between the owner and the contractor."

Kellam, Judge, in delivering the opinion of the Court on page 632 says,—

"The former opinion of this Court may be found in 2 S. D. 577, where the questions then considered as controlling in the case, were discussed at length."

Upon referring to that decision this Court will find that that Court say in the syllabus,—

"1. A subcontractor who furnishes materials, lumber or labor, not to the owner, but to the contractor for the erection of a new building, can, under the provisions of Section 5469, 5470 Comp. Laws, acquire and enforce a lien on the building, and on the interest of the owner of the real estate on which the building stands, to the extent of the value or the price agreed to be paid by the contractor for the material, lumber or labor furnished.

"3. If a subcontractor files his claim within sixty days after he has furnished the material or performed the labor, he is entitled to his lien without any further notice than such filing may give the owner.

"4. It is not the contract between the original contractor and the owner which supports the lien under the statute, but it is the use of the material and work upon the premises—the putting of them into the building and attaching them to the freehold, whereby the owner is benefited by them, which entitles the party furnishing them to a lien to the extent of their value."

Bennett, Judge. in delivering the opinion of the Court, after discussing the facts in the case and making the statement that the question was before that Court on questions of law only, on page 583 says,—

"A large number of assignmens of error was made, but the questions involved in the bill and arising on the errors assigned, were as follows,— . . .

"2. Are Sections 5469, 5470 Comp. Laws constitutional, when construed to allow subcontractors a lien by simply showing a compliance therewith by filing a claim for a lien with the clerk of the Court within sixty days after the last material was furnished, and without presenting or serving the owner with a statement or copy thereof within thirty days after the last of such materials were sold and furnished?....This action is based upon the following section of our code, relating to mechanics' liens: 'Section 5469. Every mechanic or other person who shall do any labor upon, or furnish any material, machinery or fixtures for any building, erection or other improvements by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done or material, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to the owner on which the same is situated, to secure the payment of such labor done, or material, machinery or fixtures furnished.' * * *

" 'Section 5470. Every subcontractor, wishing to avail himself of the benefits of this chapter, shall within sixty days after the material shall have been furnished, or labor performed, file with the clerk of the District Court of the county, or the judicial subdivision in which the building, erection or other improvements to be charged with the lien is situated, a just and true account of the demand due him, after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers or incumbrancers in good faith and without notice, whose right accrued after sixty days, and before any claim for the lien was filed, or against the owners, except the amount due the contractor at the time of filing the same.' "

It was claimed in this case, as in the case at bar, that this statute deprived the owner of his property without due process of law, and impaired the obligation of the contract, and for that reason was unconstitutional.

Judge Bennett, on page 587 of the opinion, says,—

"The appelant further contends that if the lien law should be so construed as to give a lien to the respondents, without giving the owner notice, it impairs the obligation of the original contract and operates to effect the taking of appellant's property without due process of law, and is void because unconstitutional. * * * In answer to this, we would say that the liability of the owner of the building, which is being erected or repaired, to pay a subcontractor for labor performed or materials furnished, is not placed on the ground of the contract made with the owner by the person performing the labor or furnishing the material, because usually there is no such contract between them, but upon the ground that as the labor and material contributed to the erection or reparation of the building of which the owner receives the benefit, the law imposes upon him the responsibility for sixty days, at least, of seeing that the claims are paid. * * * It prevents the owners of real estate from securing to themselves, without compensation, the benefits of the labor and materials of others, by means of low contracts with irresponsible or perhaps dishonest contractors. Were it otherwise, however, and the lien operated directly upon the contract, it could not have the effect contended for by the appellant.

"When a contract is entered into by the parties, it is not the contract which creates the lien under the statute, but it is the use of the materials and work upon the premises, the putting of them into the building, and attaching them to the free-hold, which entitles the party furnishing them to a lien to the extent of their value. Further, it is a well known and elementary principle that contracts must be expounded according to the law in force at the time they were made. The law under which a contract is made is a part of the contract, as much as though it were incorporated into it. When appellant contracted with defendants, Smith Brothers, whereby he contracted to pay them for the erection of the building, as it progressed, and did so, it was at his risk; for the law, which was a part of the contract, said. 'If there are subcontractors who have furnished material and performed work for this contractor, they shall have their full pay; if the contractor does not pay them, the owner of the

building must pay them; if he does not, they shall have a lien upon the building for sixty days at least to enforce their payment.' The inconveniences of the law do not seem to us to be insuperable. They are based upon the real or supposed hardship that in many instances it subjects the owner to the liability of making double payments for the same work or material, and prevents him from making contracts for the erection of buildings and the furnishing of materials to be paid for otherwise than in money, and many other similar inconveniences. These might have much force if addressed to the legislature, the law-making power, and we may have very serious doubts as to the policy or the necessity of such a law, and we can, with propriety, recommend to the legislature that it would be wise and beneficial that it should be changed in this particular, yet these considerations can not have much weight against the clear and unequivocal terms of the statute. Still, if these inconveniences exist, they can always be provided against at the time the contract is made. The owner can protect himself by a bond or other security, or may make such a contract as will allow him to withhold from the contractor for a period of sixty days after the completion of the work, enough to protect the property from liens for work or material performed or furnished by persons other than the original contractor. There are many other states whose mechanics' lien laws are similar in their main features to ours, and many of them have been construed by the Supreme Courts of those states, and those decisions are in harmony with the conclusions herein enunciated."

Citing,—

Gardner vs. Leck, 48 N. W. 1120;
Donahy vs. Clapp, 12 Cush. 440;
Parker vs. Bell, 7 Gray 429,

and many other cases.

In the case of *Gardner vs. Leck*, supra, the Court, in answer to the argument that such a lien law amounts to the taking of property without due process of law, and interferes with the owner's right and freedom of contract, says,—

"This question is not a new one, but has been frequently raised and met in the case of lien laws in various states which contain the same general features, and while the policy of such laws has been often questioned, yet so far as we have discovered, they have always been upheld as valid. * * *

That while no man can be deprived of his property without his consent, and while the basis of a right to a lien against property is the consent of the owner, yet the contract of the owner with the contractor, made under and subject to the provisions of an existing lien law, is evidence of the authority of the latter to charge the property with the liabilities incurred by him in performing his contract, and operates by virtue of the statute as authority to do so."

The same principle is recognized and upheld in *Donahy vs. Clapp*, supra, where Chief Justice Shaw says—

"Such a contract, by force of the existing law when it was made, of which the owner is presumed to be cognizant, gives his irrevocable power to his contractor to charge and bind his estate, and when such power is executed by the actual making of such contract, it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

As is well stated by the Supreme Court of Minnesota, above referred to, the question now before this Court is not a new one, and the mechanics' lien law of Ohio which is attacked in this case, contains the same general features of the laws of the various states of the Union, which have been almost universally upheld, there being, as stated by Judge Lurton, in the opinion below, but two well defined exceptions to this rule—those in the states of Michigan and Pennsylvania, and as already pointed out by the Supreme Court of Indiana, the Michigan law can be distinguished from our case, and as stated by Judge Lurton, in the opinion below (see 86 Fed. pp. 378 and 379,—

"The Ohio act involved here, contains no provision *expressly prohibiting an agreement limiting the supposed agency of the contractor for the owner*, or restraining him from creating any lien, such as was contained in both the Michigan and Pennsylvania statutes. If such acts are properly to be regarded as constituting the contractor a special agent for the owner, to which he consents by making a contract with the law before him, it would seem that the Ohio act would be valid, there being no inhibition of an agreement withholding such power, and no intimation that the hotel company, in this instance, limited the implied agency of the contractor. Certainly the Pennsyl-

vania decisions give no support to the decision of the Ohio court that the Ohio act is void. Under the settled line of decisions in Pennsylvania the Ohio act is valid. In the last Pennsylvania case, that of *Waters vs. Wolf*, cited above, the Court announces its adherence to the long line of decisions upholding just such a statute as the Ohio act involved here, saying,—'In the absence of an express contract against liens, with a statute before him giving a lien to those with whom he contracted, the consent of the owner that a remedy be given by law should be enforced under the contract, was certainly to be implied.'

"In all, or nearly all of the states there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or buildings of an owner."

In application of what is here said we desire to call especial attention to the decision of Chief Justice Gibson in *White vs. Miller*, 18 Pa. 52, the opinion beginning on page 53, where he says,—

"As soon as owners of lots ceased to be their own builders, they put it in the power of the persons employed by them to occasion losses to mechanics and material men which they ought not to bear; and it was to remedy this mischief that the legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just but a convenient one. Whether the builder be the agent of the owner, or an independent contractor, his appointment to the job creates a confidence in him which was not had before, and the consequences of a false confidence ought not to be borne by those who had no hand in occasioning it. Nor does the rule of the legislature bear hard on the owner. He has it in his power to detain the price of the building while there are outstanding charges against it or to stipulate for security against those that might afterwards turn up; and if he use common prudence, any loss which occurs will eventually fall on the author of it. If he do not, he can not charge the mechanic or material men with the consequence of his own supineness."

See also,—

Taylor vs. Murphy, 148 Pa. 337.

The following decisions have upheld the constitutionality of similar laws to the one now under consideration:

In New York,—

Blauvelt vs. Woodworth, 31 N. Y. 285.
Glacius vs. Black, 67 N. Y. 563.

In Minnesota,—

O'Neil vs. St. Olaf's School, 26 Minn. 329.
Bohn vs. McCarthy, 29 Minn. 23
Laird vs. Moona, 32 Minn. 358.
Gardner vs. Leck, 46 Minn. 285.

In Maine,—

Spofford vs. True, 33 Me. 283.
Taggard vs. Buckmore, 42 Me. 77.

In Wisconsin,—

Mallory vs. LaCrosse Abattoir Co., 80 Wis. 170.

In Missouri,—

Henry & Coatsworth Company vs. Evans, 97 Mo. 47.

In Massachusetts,—

Parker vs. Bell, 7 Gray 420.
Donahy vs. Clapp, 12 Cush. 440.
Bowen vs. Phinney, 162 Mass. 593.

In Tennessee,—

Cole Manufacturing Co. vs. Falls, 90 Tenn. 471, and cases there cited.

In California,—

Hicks vs. Murray, 43 Cal. 515.

In Rhode Island,—

Gurney vs. Walsham, 16. R. I. 699.

In Virginia,—

Roanoke etc. Co. vs. Karn, 80 Va. 589.
N. & W. Ry. Co. vs. Howison, 81 Va. 125.

In Washington,—

Spokane Co. vs. McChesney, 1 Wash. Rep. 609.

In Connecticut,—

Payne vs. Tillinghort, 52 Conn. 632.

In Maryland,—

Frensch vs. Shyrock, 51 Md. 162.

These authorities were all examined and cited in the opinion of the Court of Appeals below.

Judge Lurton, in this opinion (see decision 86 Fed. 379), says,—

> "In a large number of cases, the question of the constitutionality of acts extending the lien to subcontractors and others having no direct contractural relation with the owner has been brought in question, and the validity of the legislation upheld. In still other instances, such acts have been enforced without question as to their constitutionality. We cite a number of cases, though by no means all, in which acts involving questions identical with those raised by the Ohio statute have been enforced either after their validity had been challenged or *sub silentio*."

And after citing decisions from the courts of last resort of very many of the states on this question, on page 383 of the decision, he says,—

> "The direct question as to the constitutionality of acts extending a lien to subcontractors and material men furnishing materials at the instance of contractors, has not arisen in the Supreme Court of the United States, nor in any of the United States Courts of Appeals, so far as we have been able to discover."

He then calls attention to the act of congress, passed March 2, 1833, 4 Statute at Large, 695, giving a lien in the District of Columbia upon buildings to all persons who did work or furnished materials on an order of the contractor, and the decision of this Court in the case of *Winder vs. Caldwell*, 14 How. 434, in which case a subcontractor's lien was upheld and protected although the constitutionality of the enactment was not raised. In that case Justice Greer, in speaking for the Court, said,—

"The aim and policy of this act is also obvious. Experience has shown that mechanics and tradesmen who furnish labor and material for the construction of buildings are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanics and materials are incorporated in them, the owner becomes insolvent, and sells the buildings or incumbers them with liens; and thus one portion of his creditors are paid at the expense of the labor and property of others. Or, the insolvent owner, who builds by the agency of the contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated."

Judge Lurton, in discussing this feature of the case on pages 383 and 384 of his opinion, says,—

"In *Grant vs. Strong*, 18 Wall., 623, and *McMurray vs. Brown*, 91 U. S. 258, and *Van Stone vs. Stillwell & Bierce Manufacturing Co.*, 142 U. S. 128, the question of waiver of the lien given under various state statutes, was considered. In considering the character and nature of the lien the Court, in *McMurray vs. Brown*, 91 U. S. 258-266, said,—

" 'Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed, or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis that, if the stipulated labor is performed or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time.'

"In *Van Stone vs. Stillwell & Bierce Manf'g Co.*, 142 U. S. 128-136, it was said,—

" '*It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives*

the material man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of or with reference to, the statute.'

"In *Central Trust Company vs. London,* 31 U. S. A., pp. 387-422, a lien in favor of subcontractors was enforced against mortgagees by this Court. Judge Taft, in delivering the opinion of the Court, touching the character of the lien, said,—

" 'A subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. *Green vs. Williams,* 8 Pickle (Tenn.) 220. It is independent of, and superior to, his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company. Therefore, the assignee of a principal contractor's lien is junior to the subcontractor who has perfected his statutory lien.'

"In *Central Trust Company vs. Richmond, etc., R. Co.,* 31 U. S. A., pp. 675-688, we enforced a lien in favor of such subcontractors arising under a Kentucky statute. Touching the origin and nature of the lien, we said,—

" 'It is not a lien originating in a contract for a lien, but arises out of the statute independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered.' * * *

" 'The clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent, direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractors does not spring out of the lien of the contractor, and is not derived therefrom or subordinate thereto. The aggregate of all liens is not to exceed the contract price agreed to be paid by the owner, but this limitation concerns not the fact of a lien, but the extent thereof. Being a direct lien, its existence does not depend upon the existence or non-existence of a contractor's lien, and the waiver of a lien by a contractor, will not affect the subcontractor's lien.' "

Before passing from the cases decided by the Supreme Court of the United States, in which a lien law was recognized and enforced, although the question as to the constitutionality of the laws was not raised, and where, as stated by Judge Lurton, the Court sustained such laws *sub silento,* we desire to call attention to the very recent

decision of this Court, in the case of *Springer Land Association vs. Ford,* 168 U. S. 513, where the mechanics' lien law of New Mexico was upheld and enforced.

On page 521 of this report, the provisions of the New Mexico statute then under consideration, are set out in full. We quote from these pages as follows,—

> "Section 1519. A lien is a charge imposed upon specific property by which it is made security for the performance of an act.
>
> "Section 1520. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for work or labor done or materials furnished by each respectively, whether done or furnished at the expense of the owner of the building or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining or of the construction, alteration or repair, either in whole or in part of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act."

The other sections of the statute are set out, but we have quoted sufficient to show that the New Mexico law is almost identical with the section of the statutes of Ohio now under consideration.

The law of New Mexico, quoted above, is open to all the objections that can be made to the Ohio law. It is true a constitutional question was not raised in that case, but if the law was void, the lien could not be upheld.

We call especial attention to the syllabus of the case, and the opinion delivered by Chief Justice Fuller on page 524.

This Court, in *Van Stone vs. Stillwell & Bierce Manuf'g Co.,* 142 U. S., 128-136, has recognized the same principle of law set forth in the numerous decisions, sustaining sub-contractors and material men's liens, and in answer to the argument that it takes the owner's property without his knowledge or consent, and deprives him of his

property without due process of law, and interferes with his freedom to contract, it is there stated by Justice Lamar on page 136:

> *"It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the material furnished, and the work and labor expended by the contractors, whereby the building becomes a part of the freehold that gives the material man and laborer his lien under the statute.* The lien is brought into operation by virtue of the statute, and the contract for building is entered into *presumably in view of*, or with reference to, the statute."

The cases sustaining mechanics' lien laws, such as the one now before this Court, proceed upon this theory, and we insist that it is the correct one. The following are a few of the principal cases upholding this doctrine:

> *Cole Mfg. Co. vs. Falls*, 90 Tenn., 466.
> *Henry & Coatsworth Co. vs. Evans*, 97 Mo., 47.
> *Mallory vs. LaCrosse Abattoir Co.*, 80 Wis., 170.
> *Smith et al. vs. Newbauer*, 144 Ind., 95.
> *Albright vs. Smith*, 2 S. D., 577.

The argument that the act in effect deprives the owner of his property without due process of law, and impairs the obligation of contract, is so clearly answered by Judge Lurton in the opinion of the Court below on pages 387 and 388 of the 86th Fed. Rep., that we wish to repeat what is there said.

He says,—

> "Such statutes rest upon the principle of natural justice, which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who at the instance of his contractor shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract.

"If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.'

Edwards vs. Kearzy, 96 U. S., 595.
Greenwood vs. Freight Co., 105 U. S., 13.
Denny vs. Bennett, 128 U. S., 489
Smith vs Parsons, 1 Ohio, 236.
Weil vs. State, 46 O. S., 450.

"Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

"Provident Institution vs. Jersey City, 113 U. S., 506-514."

See also,—

New York vs. Squire, 145 U. S., 175.

The reasoning we insist is sound, and the policy of the rule a wise one.

If the weight of authority is to be found on the side where there is arrayed the greatest number of decisions on the point in dispute, then this lien law in question stands supported by an almost unbroken line of authorities. Ohio stands outside of the line and nearly alone.

It is claimed by the other side that Ohio has good company in the companionship of Alabama, Michigan, Missouri and Pennsylvania, as witness the *Stoddart* case, 116 Ala., 251; the *Spry Lumber Co.* case, 77 Mich., 199; the *Henry* case, 18 Mo. App., 497, and the *Waters* case, 162 Pa. St., 153; but a brief reference to these cases will dispel the illusion that Ohio has all of these states with it on the proposition before us.

The Henry case in 18 Mo. App., has been overruled by the Supreme Court of Missouri in the case of *Henry & Coatesworth Co. v. Evans*, 97 Mo., 47.

In the *Spry Lumber Co.* case, 77 Mich., 199, the court had before it a mechanics' lien statute of Michigan which gave the sub-contractor or material man a lien regardless of the contract between the owner and principal contractor, and unlimited thereby, and declared it unconstitutional. Such a statute would allow a sub-contractor or material man to secure a lien for an unlimited amount on the owner's property for the price of a brick or stone structure, even though his contract with his principal contractor called for a frame building at a specified figure. This statute upon every principle of right, reason and sense should fall.

But note the case of *Smalley vs. Gearing*, 121 Mich., 190, where the Supreme Court of Michigan pronounced valid and constitutional a statute of that state every whit as broad in its provisions, which are here assailed, as the Ohio Statute in question. We quote copiously from that report as follows:

> "1. It is contended by the property owners that the act of 1891, as amended by the act of 1893, is unconstitutional, because it is an unwarrantable abridgement of the freedom of contract, and because it undertakes to give special and unreasonable privileges to one class of citizens at the expense of another. The amendatory act of 1893 amends sections 1, 6, and 9 of the act of 1891. Section 1, as amended, provides substantially:
>
> " 'Every person who shall, as sub-contractor, laborer, or material man, perform any labor or furnish materials to such original or principal contractor, or any sub-contractor in carrying forward or completing any such contract shall have a lien therefor upon such house * * * to the extent of the right, title, and interest of such owner. * * * *Provided*, that any person * * * furnishing material or performing labor of any kind entering into the construction of such building * * * shall, within ten days after furnishing the first of such material or performing the first of such labor to any contractor or sub-contractor, serve on the owner * * * a notice which shall be such as will inform the owner * * * of the nature of the materials furnished or to be furnished or labor performed or to be performed, and a description of the

premises where furnished. * * * Such notices, however, shall be sufficient if served at any time subsequent to said ten days, but before the original contractor shall make out and give to the owner * * * a statement under oath of the number and names of every sub-contractor or laborer in his employ, and of every person, * * * furnishing materials, giving the amount, if anything, which is due or to become due to them, or any of them, for work done or materials furnished, as required by section four of this act. The owner * * * shall not be liable to the sub-contractor, material men, or laborers for any greater amount than he contracted to pay the original contractor; * * * but the risk of all payments made to the original contractor after he shall have received the notice above mentioned, or before the contractor shall have furnished him with a statement as hereinbefore provided, shall be upon the owner * * * until the expiration of sixty days within which claims for liens may be filed, as hereinafter provided, and no payment made to any contractor before the expiration of said sixty days shall defeat any lien of any sub-contractor, material man, or laborer, unless such payment has been distributed among the sub-contractors, material men, or laborers, or, if distributed in part only, then to the extent of such distributions.'

"Section 4 of the act of 1891, which was not amended by the act of 1893, provides:

" 'The owner * * * may at any time retain from any moneys due or to become due to the original contractor an amount sufficient to pay all demands owing or unpaid to any sub-contractor, material man, or laborer who has filed and served the notice in the manner and form as provided in section one of this act. The original contractor shall, whenever any payment of money shall become due from the owner, * * * or whenever he desires to draw money from the owner * * * make out and give to the owner * * * a statement under oath of the number and names of every sub-contractor or laborer in his employ, and of every person furnishing materials, giving the amount, if anything, which is due or to become due to them, or any of them, for work done or materials furnished; and the owner * * * may retain out of any money then due or to become due to the contractor an amount sufficient to pay all demands that are due or to become due to such sub-contractors, laborers, and material men, as shown by the contractor's statement, and pay the same to them, according to their respective rights; and all payments so made shall, as between such owner

* * * and such contractor, be considered the same as if paid to such original contractor. Until the statement provided for in this section is made, in manner and form as herein provided, the contractor shall have no right of action or lien against the owner * * * on account of such contract; and any payments made by the owner * * * before such statement is made, or without retaining sufficient money, if that amount be due or is to become due, to pay the sub-contractors, laborers, or material men as shown by the statement, shall be considered illegal, and made in violation of the rights of the persons intended to be benefited by this act, and the rights of such sub-contractors, laborers, and material men to a lien shall not be affected thereby.'

"The argument against the constitutionality of the act is that, by the amendment of 1893, the owner is prohibited from paying according to the terms of his contract, and the contractor is prevented from obtaining his pay, whenever it appears from the sworn statement that there are bills outstanding in favor of sub-contractors, laborers, or material men; and this, although no person to whom a bill is owing has notified the owner that he proposes to claim a lien. It is insisted that this provision of the law, if enforced, will utterly destroy the system of credit as applied to the building business; that every contractor must pay cash or go out of business; that, no matter how good his credit, or how willing those who supply him may be to trust him, he cannot take advantage of it, because the law forbids; that that flexibility of contract, varying according to circumstances, which is the life of commerce, will be destroyed, and no contract can be safely carried out which does not follow the narrow, rigid lines prescribed by the statute. Counsel cite the case of *John Spry Lumber Co. v. Sault Savings Bank, Loan and Trust Co.*, 77 Mich., 199 (6 L. R. A., 204; 18 Am. St. Rep., 396), as sustaining their contention.

"Act No. 270, Pub. Acts, 1887 (3 How. Stat., Sec. 8398*a* et seq.), was there under consideration. Section 2 of that act provided:

" 'Such lien shall not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made, or for which such materials are furnished, and the original or any sub-contractor, or by any payment made by such owner, part owner, or lessee to such contractor or sub-contractor for the contract price of such labor or material (materials), or any part thereof,

in case the person performing such labor, or furnishing such material, shall comply with the provisions of this act.'

"It was said:

" 'This law makes the mere fact that a building contract exists, or has existed, a sufficient reason for binding the land for any act or omission of the building contractor or his sub-contractor, whether within the range of the contract or not, or whether or not in harmony with its terms. * * * It strikes at the foundations of all property in land. * * * The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer.'

"That statute was very unlike the present. The present act provides, by section 1 (Act No. 199, Pub. Acts 1893), as well as by the same section amended in 1897 (Act No. 143, Pub. Acts, 1897), that:

" 'The owner * * * shall not be liable to the sub-contractor, material men, or laborers for any greater amount than he contracted to pay the original contractor, and shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract.'

"In this respect the act differs from the act of 1887. By this provision the owner is fully protected upon any breach of the contract. As to the matter of payments, that section provides:

" 'The risk of all payments made to the original contractor after he shall have received the notice above mentioned, or before the contractor shall have furnished him with a statement as hereinbefore provided, shall be upon the owner * * * until the expiration of sixty days within which claims for lien may be filed, as hereinafter provided, and no payment made, to any contractor before the expiration of said sixty days shall defeat any lien of any sub-contractor, material man, or laborer, unless such payment has been distributed among the sub-contractors, material men, or laborers, or, if distributed in part only, then to the extent of such distribution.'

"This provision points out the way in which the owner may safely make payments; that is, he need incur no risk: *First*, if he refuses payment until he is provided with a sworn statement of the contractor, and complies with it; *second*, if the money paid is distributed, in accordance with the statute, among those who might acquire liens, even though he makes payments

without the sworn statement. The owner is not required to make payments beyond the amount called for in the contract. It will be seen, therefore, that he is fully protected if he follows the requirements of the statute. It is true that the original contractor may not be able at all times to get the moneys into his own hands from the owner as rapidly as the contract calls for—that is, his sworn statement may show that there is an indebtedness to sub-contractors, material men, and laborers, and these moneys the owner may withhold, and pay directly to those persons. But the contract must be presumed to have been made in view of these provisions of the statute. *Warren v. Sohn*, 112 Ind., 213; *Provident Inst. for Savings v. Mayer, etc., of Jersey City*, 113 U. S., 506; *Reynolds v. Black*, 91 Iowa, 1. The statute was intended to protect sub-contractors, material men, and laborers, and its benefits should not be frittered away by construction, unless clearly unconstitutional. It does not impair the obligations of contracts, but provides a method for securing payment to those whose labor or material goes into the building, and at the same time protects the owner and contractor, if the provisions of the act are complied with. The doctrine upon which such liens are founded is the consideration of natural justice that the party who has enhanced the value of property by incorporating therein his labor or materials shall have a preferred claim, in a certain sense, on such property, for the value of his labor or materials.

The specifications of the contract between Schmidt and Gearing contain this provision:

"'The building or works must be delivered up free of all mechanics' liens or other claims chargeable to the contractor.'

"It is the contention of the owners of the property that this provision prevents any of the lien claimants in this cause from obtaining a lien. This contention cannot be sustained. The contract was made in reference to the lien statute, which expressly confers upon material men and laborers the right to assert liens. In *Whittier v. Wilbur*, 48 Cal., 175, a like question was presented under a somewhat similar contract. It was said:

"'The contractor and owner cannot deprive the material man of his lien by introducing a stipulation into the building contract by which the contractor agrees to indemnify the owner

against any lien by persons furnishing materials to be used in the construction of the building.'

See, also,—

Boisot, Mech. Liens, 225 and 227."

Such is the latest declaration by the Supreme Court of Michigan on the validity of the mechanics' lien law. In this decision is met and answered all the arguments that are, and can be put forth against the lien law of Ohio. Small comfort can be found by the petitioner in the State of Michigan in the light of this decision. It deprives the other side of all right to claim that Michigan should be catalogued with Ohio in the line of decisions condemning the latter's lien statute in question.

As to Pennsylvania it is only necessary to refer to the decision by Lurton, J., at page 378, 86 Fed., where he concludes as follows:

> "In the last Pennsylvania case, that of *Waters vs. Wolf*, cited above, the court announces its adherence to the long line of decisions upholding just such a statute as the Ohio act involved here."

And so it did, but it condemned the act then before it because, like the statute of Michigan, construed in the Spry Lumber Co. case, 77 Michigan, *supra,* it allowed a lien for an unlimited amount.

We are forced to admit that the Stoddart case in Alabama leaves the decision in that state as a companion-piece with the decision in Ohio.

Besides finding approval in later decisions of the Federal courts, the decision by Lurton, J., of this case in the court below, has been followed, and the reasoning adopted, by the Supreme Courts of Kentucky and Louisiana. The statute of Kentucky was as follows:

> Section 2463: "A person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or the improvement in any manner of real estate, by contract with or by

the written consent of the owner, contractor, subcontractor, architect or authorized agent, shall have a lien thereon, and upon the land upon which said improvement shall have been made, or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of material; and said lien, if asserted as hereinafter provided shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials: Provided, that such lien shall not take precedence of a mortgage or other contract lien or bona fide conveyance for value without notice, duly recorded or lodged for record according to law unless the person claiming such prior lien shall, before the recording of such mortgage or other contract lien or conveyance have filed in the clerk's office of the county wherein he shall have performed labor or furnished materials as aforesaid, a statement showing that he has performed or furnished, or that he expects to perform or furnish, such labor or materials and the amount in full thereof, and his lien shall not, as against the holder of said mortgage or other contract lien or conveyance, exceed the amount of the lien claimed, or expected to be claimed, as set forth in such contract. * * * The liens provided for herein shall in no case be for a greater amount in the aggregate than the contract price of the original contractor; and should the aggregate amount of the liens exceed the price agreed upon between the original contractor and the owner, then there shall be a pro rata distribution of the original contract price between said lien holders."

Discussing the constitutionality of the above statute in the case of *Hightower vs. Bailey*, 22 Kentucky Law Reporter, 88, 90, (1900) 56 S. W. 147, 49 L. R. A. 255, Chief Justice Hazelrigg said:

"This contention (that the statute violates the obligation of contract) is not without authority to support it. The Ohio courts seem to so hold, and perhaps also the courts of Michigan. But the weight of authority seems to be the other way.

* * * * * * * * *

"An elaborate and learned discussion of this question is found in *Jones vs. Great Southern Fireproof Hotel Company*, 86 Fed. Rep. 370, considered in the United States Circuit Court of Appeals before Judges Lurton and Taft and District Judge Clark. After reviewing the authorities the learned judge (Lurton)

said: 'But the validity of the statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation. * * * The legal effect of the contract (between the owner and the contractor) is to give a lien to all who, at the instance of the contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a contract is limited to future contract it cannot be said to impair the obligation of a contract.'

"If the law be subject to no other objection it impairs no contract for all thereafter may be made or entered into upon the basis of law. * * * Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes contract under the law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

The Supreme Court of Louisiana in the case of *McKeon vs. Sumner Building and Supply Co.*, 51 La. Ann. 1961, quotes from Judge Lurton's opinion as follows:

"By implication, the contractor is the agent of the owner, and by implication the owner consents to the privilege of the working man on his property to the extent that he owes the contractor. *Jones vs. Great Southern Fireproof Hotel,* 86 Fed. Rep. 378."

The policy and benefit of such laws have been ably and clearly pointed out by this Court, as early as *Winder vs. Caldwell,* supra, and nearly all of the State Courts have adopted the same views. The liberty granted by the Constitution of the United States and the State of Ohio, is not intended to be a license for a person to do whatever he pleases in his individual acts or with his property. It is a liberty restrained by such legislative enactments as may be for the general public good, and what is for the public good is left for the determination of the legislative department of the government. The argument

as to whether the legislature has acted wisely in formulating and passing such acts, must be addressed to the legislature and not to the Courts.

The authorities already cited, and many more might be found to the same effect, clearly show that the act in question violates none of the contitutional privileges pointed out under the first three objections raised by the counsel for the petitioner, and no constitutional inhibitions can be found against these enactments, either in the state constitution of Ohio, or the Constitution of the United States.

Much more might be said upon this subject, but in view of the very able opinion rendered by the Court of Appeals, and the exhaustive argument made by other counsel for respondents upon the same question, we do not wish to tax the patience of the Court longer by additional citations upon these points. It remains only to consider the fourth and last objection made to the law, to-wit, that it is obnoxious class legislation.

III.

Class Legislation.

Counsel for the petitioner claim that the act in question is class legislation, which comes within the inhibition of the constitution. We have made a most thorough examination of the authorities, and we find but few cases in which counsel have had confidence enough in this point to raise it in the case of mechanics' liens, and in every case in which it was raised, the Courts have summarily brushed it aside as not being worthy of consideration.

If the act in question is class legislation, then all acts creating or establishing mechanics' liens are subject to the same objection. It seems to be generally admitted that the legislature has power over this subject. The authorities we have already cited seems to us to show conclusively the right of the legislature to enact the law in

controversy, provided it has authority in any manner to legislate upon the subject of mechanics' liens.

In *Summerlin vs. Thompson et al.*, 31 Fla. 369, the Court say in the fifth paragraph of the syllabus,—

> "The act of 1887 (Chapter 3747) is not amenable to the objection that it is unconstitutional, because it confers special powers or special jurisdiction upon the Courts, or changes the general rule of practice in favor of a class."

The case which was before the Supreme Court of Florida for consideration, involved the constitutionality of a mechanics' lien law, and the same question was raised in regard to this being special or class legislation, as is made in the case now before this Court.

Mabry, Judge, in delivering the opinion of the Court, on page 389 says,—

> "The constitutionality of the act is questioned on the ground that so much of it as confers special powers or special jurisdiction upon the Courts, in favor of a class, is unconstitutional. It is not denied that all persons similarly situated are equally affected by the act. Counsel cites no authority to sustain the position assumed. It is not tenable. Further discussion of it is unnecessary."

Only two other cases have been brought to our attention in which counsel have raised this point. They are the cases of,—

> *Davis vs. The State*, 3 Lea, (Tenn.) 380, and *Cole Mlg. Co. vs. Falls*, 90 Tenn. 471.

already cited under another paragraph of this brief.

This subject, however, has been ably and fully discussed by this Court, and many of the Courts of last resort in the different states, and lawyers and Courts throughout the United States seem to concede that legislation upon the subject of mechanics' liens is not open to the objection raised by counsel in this case.

In *Budd vs. New York*, 143 U. S. 517, this Court held that an act of the legislature of the State of New York, regulating the rates applied to charges for elevating grain, popularly known as the elevator cases, which applied only to cities having a population of 130,000 or

more, was not an infringement of the citizens' constitutional rights.

The following statement appears in the syllabus:—

> "An act of the legislature of New York (Laws of 88, Chapter 581) providing that the maximum charge for elevating, receiving, weighing and discharging grain, should not exceed five-eighths of one cent a bushel, and that in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, should only be required to pay the actual costs of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading; held,—that the act was a legitimate exercise of the police power of the state over a business affected with a public interest, and did not violate the Constitution of the United States, and was valid.
>
> "The case of *Munn vs. Illinois*, 94 U. S., 113, reviewed and adhered to, and its application in cases decided in the State Courts considered.
>
> "The decision in *Chicago, etc., Railway Co., vs. Minnesota*, 134, U. S. 418, explained.
>
> "Although the act of New York did not apply to places having less than 130,000 population, it did not deprive persons owning elevators in places of 130,000 population, or more, of the equal protection of the laws."

In *Wunderle vs. Wunderle*, 144 Ill. 40, the question of class legislation is discussed and the term defined.

In that case the Supreme Court of Illinois hold that the alien land law, which forbids the transfer of title, etc., of land to non-resident aliens, although under treaties with some foreign states, it could only apply to certain classes of non-resident aliens, is a valid enactment.

The Court say in the twenty-ninth paragraph of the syllabus,—

> "Laws are general and uniform when alike in their operation upon all persons in the like situation, and the fact of their being general and uniform, is not affected by the number of those within the scope of their operation."

In *Hing vs. Crowley*, 113 U. S. 703, Justice Field, in delivering the opinion of the Court, on page 708 says,—

> "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the

just grounds of complaint, because like restrictions are not imposed upon another business of a different kind. The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right, which all can claim in the enforcement of the laws."

See also,—

Cooley's Constitutional Limitations, 5th Ed., 482-483.

See also the language of Justice Field in *Barbier vs. Connelly*, 113 U. S. 27, on pages 31 and 32 of the opinion of the Court.

The provision of the constitution invoked by the petitioner in this case is clearly and elaborately discussed by Judge McIlvane in *State vs. Powers*, 38 Ohio State 54. We call particular attention to the opinion on pages 62 and 63, and the authorities there cited.

We also call especial attention to the cases, of,—

Barbier vs. Connelly, 113 U. S. 27, 31-32.
Kidd vs. Pearson, 128 U. S. 1.
New York vs. Squire, 145 U. S. 175.

It is true the cases last cited are based upon the police power of the state, but the principles of law there enunciated, and the discussion as to what constitutes class legislation, are clearly applicable to the case at bar, and the police power as defined in these cases, is certainly broad enough to cover this case

We call attention to the decision of this Court in *Budd vs. New York*, 143 U. S. 517, already referred to. The enactment in that case was certainly open to all the objections raised against the act now in question, and this court held that the act was a legitimate exercise of the police power of the state over the business affected.

The decision of the Ohio Supreme Court in *Cleveland v. Construction Co.*, 67 O. S., 197, will hardly find favor in this court in view of the decision of this court in *Atkin v. Kansas*, 191 U. S., 207, where this court took a view of a similar law directly contrary to

that announced by the Supreme Court of Ohio in the last case above cited. It may also be added that the decision of the Ohio Supreme Court, reported in the 67 State Report, *supra*, is out of harmony with the decision of this court in *Holden vs. Hardy*, 169 U. S., 366.

Statutes creating liens in favor of mechanics are not class legislation of a character rendering them obnoxious to constitutional provisions of the various states. On the contrary they belong in that category of legislation which has for its object the general welfare and which may fairly be said to be covered by the broad term of the police power of the state under which such laws, in common with all others of a like character, are classable.

Many more authorities might be cited to the same effect, but it seems to us wholly unnecessary in view of the numerous decisions we have already cited upon other branches of the case, which also cover this phase of the case.

If the act in question is inhibited by the constitution because it is class legislation, then all mechanics' lien laws must fall under the same ban. We have found no authority nor any decision of any Court of last resort holding that such legislation is class legislation, and therefore within the inhibition of the constitution.

In conclusion, we again call especial attention to the opinion of the Circuit Court of Appeals delivered by Judge Lurton, and reported in 86 Fed. 370, which contains a full, clear and fair exposition of the law applicable to this case, and a very learned discussion of the constitutional principles raised, and although expressing regret at their inability to agree with the Supreme Court of Ohio, the Court of Appeals upheld the constitutionality of the law.

Respectfully submitted,

GEO. K. NASH AND
LOUIS G. ADDISON,
T. J. KEATING,
Of Counsel for Respondents.

Supreme Court of the United States.

No. 165.—October Term, 1903.

The Great Southern Fire Proof Hotel Company, Petitioner, vs. Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., et al.	On writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

[April 4th 1904.]

Mr. Justice Harlan delivered the opinion of the Court.

The Great Southern Fire Proof Hotel Company, a corporation of Ohio, made a contract with one McClain for the construction of a hotel building and opera house at Columbus, Ohio.

McClain contracted with Jones & Laughlins, Limited, a partnership association organized under the laws of Pennsylvania, for a certain amount of steel to be used in the buildings which he undertook to erect.

Under that contract Jones & Laughlins, Limited, furnished steel of the value of $43,296.74.

Proceeding under certain statutes of Ohio relating to liens for mechanics and others, Jones & Laughlins, Limited, brought suit in the Circuit Court of the United States for the Southern District of Ohio against the Hotel Company, to enforce a lien asserted by them on the hotel building and opera house for the balance due on their contract with McClain. Various persons were made defendants because they asserted claims upon or interest in the property. It was a case in which the jurisdiction of that court depended upon diversity in the citizenship of the parties. Upon final hearing the Circuit Court dismissed the bill on the ground that the statute of Ohio of April 13th 1894, (91 *Ohio Laws*, 135,) under which Jones & Laughlins, Limited, proceeded, was repugnant to the Constitution of Ohio. 79 *Fed. Rep.* 477. Upon appeal to the Circuit Court of Appeals, that court, being of opinion that the statute was constitutional, reversed the decree of the Circuit Court. 58 *U. S. App.* 397; 86 *Fed. Rep.* 370. The case was then brought here upon writ of certiorari, and this court, without considering the merits, reversed the judgments of both courts upon the ground that the record did not affirmatively show a case of which the Circuit Court could properly take cognizance, so far as the citizenship of the parties was concerned. In the opinion then rendered we said that under the circumstances the plaintiffs should be permitted to amend their pleadings as to the citizenship of the parties; and, if a case could be pre-

sented within the jurisdiction of the Circuit Court, the parties should be allowed to proceed to a final hearing on the merits. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 *U. S.* 449.

Upon the return of the cause the plaintiffs filed an amended bill of complaint, which cured the defect in its original bill as to the citizenship of the parties. The case went to a final hearing upon the merits, and a decree was rendered in favor of the plaintiffs. That decree was affirmed in the Circuit Court of Appeals. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 116 *Fed. Rep.* 793. The case is again here upon a writ of certiorari granted upon motion of the Hotel Company.

The statutory provisions, questions as to the constitutionality of which have been raised in this case, are certain sections of the Revised Statutes of Ohio, as follows:

"SEC. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well or any other well, or performs labor of any kind whatsoever, in altering, repairing or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof or his agent, trustee, contractor or subcontractor, shall have a lien to secure the payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed.

"SEC. 3185. Such person, in order to obtain such lien, shall, within four months from the time of performing such labor, or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, manufactory, or other buildings, or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept

therefor, and shall operate as a lien from the date of the first item of the labor performed or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time, the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

"SEC. 3185*a*. In all cases where the labor, material or machinery referred to in sections 3184 and 3185 shall be furnished by any person other than the original contractor with such owner, or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery: Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material-men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section thirty-one hundred and eighty-four, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained." 91 *Ohio Laws*, 135, 137.

The contention of the Hotel Company is that the statute under which Jones & Laughlins, Limited, proceeded was repugnant to the Constitution of Ohio; and that the Supreme Court of Ohio having held in two cases, *Palmer & Crawford* v. *Tingle*, and *Young* v. *Lion Hardware Company*, 55 *Ohio St.* 423—determined before the bringing of this suit, but after the rights of the parties had been fixed by their contracts—that the statute was inconsistent with the State Constitution, the duty of the Federal court was to follow those decisions, even if, in the exercise of an independent judgment on the subject, it was of opinion that the statute was constitutional. Is that view in harmony with the decisions of this court?

The leading case on this subject is *Burgess* v. *Seligman*, 107 *U. S.* 20, 33. In that case, which was in the Circuit Court of the United States, the rights of the parties depended upon a statute of Missouri, which had not been construed by the highest court of the State at the time those rights accrued under it; and the question arose whether the Circuit Court was entitled to determine for itself what was the true meaning of the statute. In view of some differences in forms of expression in previous cases, the

court deemed it wise to re-examine the subject upon both principle and authority, and to announce the rule by which a Circuit Court of the United States should be guided in case of a conflict of opinion between it and the highest court of the State as to the meaning and legal effect of a local statute upon which the rights of parties depended.

In that case Mr. Justice Bradley, delivering the unanimous judgment of this court, said: "The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

So in *Carroll County* v. *Smith*, 111 *U. S.* 556, in which the principal question was as to the validity, under the Constitution of Mississippi, of cer-

tain proceedings taken under a railroad charter, the Supreme Court of that State having passed on the question, it was contended that its judgment was binding on the courts of the United States. But this court, speaking by Mr. Justice Matthews, said: "It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal. *Burgess* v. *Seligman*, 107 *U. S.* 20, 33." And in *Anderson* v. *Santa Anna*, 116 *U. S.* 356, 365, it was distinctly adjudged that where rights have accrued under a State constitution or statute, "before the State court has announced its construction, the Federal courts, although leaning to an agreement with the State court, must determine the question upon their own independent judgment." In *Pleasant Township* v. *Ætna Life Insurance Co.*, 138 *U. S.* 67, 72, where the rights of one of the parties depended upon the validity of a statute of Ohio, and which statute the Supreme Court of Ohio had held after the rights of the parties had accrued, under their contract, to be in violation of the Constitution of that State, this court, although reaching the same conclusion as that announced by the State court, took care to say that the decision of the State court did not conclude this court, and that concurrence with the views expressed by the State court was the result of the exercise of its independent judgment—citing *Burgess* v. *Seligman* as having settled the law upon this subject.

In *Folsom* v. *NinetySix*, 159 *U. S.* 611, 627, which involved a question of the validity of a State enactment, this court referred to *Burgess* v. *Seligman*, and, speaking by Mr. Justice Gray, said: "There not being shown to have been a single decision of the State court against the constitutionality of the act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its own view of the law of South Carolina." In *Barnum* v. *Okolona*, 148 *U. S.* 393, which involved the validity of certain bonds, and which bonds the highest court of the State had adjudged to be void under a local statute, the court said: "As against a party who became the owner of such bonds before the decision of the Supreme Court of the State was rendered, which was the case here, we do not consider ourselves bound by such decision unless we regard it as intrinsically sound."

As late as *Stanley County* v. *Coler*, 190 *U. S.* 437, 445, relating to the validity of certain municipal bonds, this court reaffirmed the same principles. To the same effect are other cases which will be found cited in the opinion of the Circuit Court of Appeals in this case when it was first before that court. *Jones* v. *Great Southern Fire Proof Hotel*, 86 *Fed. Rep.* 370. The only exception to the general rule announced in the above cases arises when the question is whether a particular statute was passed by the Legislature in the manner prescribed by the State Constitution, so as to become a law of the State. *Town of South Ottawa* v. *Perkins*, 94 *U. S.* 260; *Post* v. *Supervisors*, (*Amoskeag Bank* v. *Ottawa*,) 105 *U. S.* 667; *Wilkes County* v. *Coler*, 180 *U. S.* 506, 520.

The plaintiffs insist that the Supreme Court of Ohio, in *Railway Co.* v. *Cronin*, 38 *Ohio St.* 122, and *Railway Co.* v. *McCoy*, 42 *Ohio St.* 251—which were determined prior to the contract between McClain and the plaintiffs—announced principles which, being applied here, would sustain the validity of the act of 1894. If this were true, then, in conformity with the settled course of decisions in this court, we should hold that the rights of the plaintiffs under their contract could not be affected by a change of decision in the State court. But, as the Circuit Court of Appeals held, the two cases just referred to should not control the decision here. Those cases, it is true, related to statutes giving liens to those who performed labor and furnished materials in the construction of railroads. But it does not appear that any question was raised or determined in them as to the constitutionality of the particular statutes there involved.

On behalf of the Hotel Company, it is contended that the cases of *Hampon* v. *State*, 8 *Ohio St.* 315, *Copeland* v. *Manton*, 22 *Ohio St.* 398, *Dunn* v. *Rankin*, 27 *Ohio St.* 132, and *Bullock* v. *Horn*, 44 *Ohio St.* 420, all prior to the act of 1894, announced general principles which, being accepted, would necessarily lead to the conclusion reached by the Supreme Court of Ohio in the two subsequent cases, above cited, in which section 3184 of that act was held to be in violation of the State Constitution. It is, therefore, contended that our interpretation of the Constitution of Ohio should be controlled by the rule stated in *O'Brien* v. *Wheelock*, 95 *Fed. Rep.* 883, 905, which involved the validity of certain municipal bonds as well as the validity of a statute of Illinois passed in 1871, the Illinois Constitution then in force being the one adopted in 1870. In that case the court observed that the Illinois act of 1871 not having been construed by the Supreme Court of Illinois before the bonds there in question were issued, it was its duty, under the rule announced in *Burgess* v. *Seligman*, to exercise an independent judgment as to the validity of that act under the State Constitution. But in so doing the court said two principles should not be overlooked, namely: "(1) That, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiffs accrued, this court should

give effect to any rules of construction that may have been previously established by the highest court of the State when interpreting similar provisions in the Constitution of 1848; (2) that the Federal courts, for the sake of harmony and to avoid confusion, should 'lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt,' and endeavor to avoid 'any unseemly conflict with the well-considered decisions of the State courts' upon questions of local law." We have already shown that it was the duty of the Federal court to lean to an agreement with the State court, and we recognize it to be equally its duty, when the rights of parties depend upon the construction of a State constitution, to give effect to any settled rules for construing that instrument which had been announced by the highest court of the State before such rights accrued. The difficulty in applying this principle here is that, prior to the two cases in 55 *Ohio St.*, the Supreme Court of Ohio had not, we think, established any rules of constitutional construction that would necessarily require us to hold the act of 1894 to be unconstitutional.

In our opinion, neither the decisions of *Palmer* v. *Crawford*, and *Young* v. *Lion Hardware Co.*, 55 *Ohio St.* 423, nor any other case in the Supreme Court of Ohio precluded the Circuit Court from exercising its independent judgment as to the constitutionality of the statute of Ohio here in question. If, prior to the making of the contracts between the plaintiffs and McClain, the State court had adjudged that the statute in question was in violation of the State Constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the State court, as to the constitutionality of the statute in question, having been rendered after the rights of parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the Federal court to lean to an agreement with the State court, where the issue relates to matters depending upon the construction of the Constitution or laws of the State.

It remains to dispose of the question of the constitutionality of the Ohio statute upon which this suit is based. In its consideration of the subject the Supreme Court of Ohio, in the Palmer-Young cases, referred to the Preamble to the constitution of that State, declaring that "We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this constitution;" to the first section of the Ohio Bill of Rights providing that "all men are, by nature, free and independent, and have certain inalienable rights,

among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety;' and to the second section of the State constitution declaring that "all political power is inherent in the people. Government is instituted for their equal protection and benefit." It then said: "The usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract, when made and entered into, cannot be impaired by act of the General Assembly." In view of these constitutional provisions, aided by the general rules of law, the State court held the statute to be unconstitutional and void, so far as it gave (*syllabus*) "a lien on the property of the owner to subcontractors, laborers and those who furnish machinery, material or tile to the contractor;" that "all to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner." 55 *Ohio St.* 423.

The Circuit Court of Appeals expressed its earnest desire, in the interest of harmony of decision, to come to an agreement with the State court, but its sense of duty compelled it to sustain the constitutional validity of the statute upon which the plaintiffs based their claim. Upon a careful consideration of the objections urged to the statute, and after an extended review of the authorities, the Circuit Court of Appeals held that the statute did not deprive the owner of his property without due process of law, nor unreasonably interfere with his liberty of contract; that the restraints put upon the owner by the provisions in favor of sub-contractors and those who furnished materials to be used by the contractor in execution of his contract with the owner, was neither arbitrary nor oppressive; that such provisions were no more onerous than required by the necessity of protecting those who actually do the work or furnish the material by which the owner is benefited; and that as the legislation in question was sanctioned by the dictates of natural justice, and, as must be conclusively presumed, was known to the owner when he contracted for the building of his house, its requirements could only be avoided by pointing out some specific part of the organic law which has been violated by its enactment.

We are constrained to withhold our assent to the views expressed by the Supreme Court of Ohio, and to express our concurrence with the Circuit Court of Appeals. The great weight of authority in this country as to the meaning and scope of constitutional provisions substantially like those to be found in the Constitution of Ohio is, in our opinion, against the conclusion reached by the learned State court. Exercising an independent judgment on the subject, we are obliged to so declare. The reasons in support of the constitutionality of the statute are cogently stated in the able and elaborate opinion of Judge Lurton, speaking for the Circuit Court of Appeals in this

case. *Jones* v. *Great Southern Fire Proof Hotel Co.*, 86 *Fed. Rep.* 371. As the reports of the decisions of the Circuit Court of Appeals are accessible to all, we will not encumber this opinion with a restatement of the grounds, so fully set forth by that court, on which the validity of the statute must be sustained. We content ourselves with referring to its opinion, and with citing, in the margin* some authorities which, in our judgment, support the views expressed by the Circuit Court of Appeals. It results that the decree must be affirmed.

It is so ordered.

Mr. Justice WHITE did not hear the argument and took no part in the decision of this case.

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* Van Stone *v.* Stillwell & Bierce Manf'g Co., 142 U. S. 128; McMurray *v.* Brown, 91 U. S. 257; Blauvelt *v.* Woodworth, 31 N. Y. 285; Glacius *v.* Black, 67 N. Y. 563; Donahy *v.* Clapp, 12 Cush. 440; Bowen *v.* Phinney, 162 Mass. 593; White *v.* Miller, 18 Pa. 52; Spofford *v.* True, 33 Me. 283; Payne *v.* Tillinghort, 52 Conn. 632; Freusch *v.* Shyrock, 51 Md. 162; Colton *v.* Frese, 45 Ind. 96; Smith *v.* Newbaur, 144 Ind. 95; Title Guarantee & Trust Co. *v.* Wren, 56 Pac. Rep. (Oregon) 271; Mallory *v.* La Crosse &c., 80 Wis. 170; Laird *v.* Noonan, 32 Minn. 358; Albright *v.* Smith, 2 S. Dak. 577; Barnard *v.* McKenzie, 4 Colo. 251; Smalley *v.* Gearing, 121 Mich 196; Hightower *v.* Bailey, 56 S. W. (Ky.) 147; Sumner Building & Supply Co., 51 La. Ann. 196; Roanoke &c. Co. *v.* Karn, 80 Va. 589; Henry & Coatsworth Co. *v.* Evans, 97 Mo. 47; Cole Manf'g Co. *v.* Falls, 90 Tenn. 466; Gurney *v.* Walsham, 16 R. I. 699. See, also, 2 Jones' Liens, 286; Phil. Mech. Liens, 324, § 30, 3d ed.

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Test:

Clerk Supreme Court, U. S.